

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 MASS ENGINEERED DESIGN, INC.,) 3:16-cv-01510-SI

4)

5 Plaintiff,)

)

6 vs.) August 25, 2016

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7 PLANAR SYSTEMS, INC.,)

)

8 Defendant.) Portland, Oregon

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13 (Status Conference)

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE MICHAEL H. SIMON

16 UNITED STATES DISTRICT COURT JUDGE

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1 APPEARANCES

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13 Also present: Paula Holm Jensen

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1 (August 25, 2016)

2 P R O C E E D I N G S

3 (In chambers; counsel present:)

4 THE COURT: All right. Good morning, everyone. We
5 are here in the case of Mass Engineered Design, Incorporated
6 versus Planar Systems, Inc., case 3:16-cv-1510, for a case
7 management conference. I think it will be easier for me if I
8 ask everyone to enter their own appearances right now, starting
9 with folks representing Plaintiff Mass Engineered.

10 MR. MANSFIELD: John Mansfield, Mansfield Law,
11 representing the plaintiff.

12 MR. EDMONDS: John Edmonds of Collins Edmonds
13 representing the plaintiff.

14 MR. SCHLATHER: Steve Schlather of Collins Edmonds
15 representing the plaintiff.

16 THE COURT: Here on behalf of Defendant Planar
17 Systems, Inc., we have?

18 MR. GILL: Jacob Gill with Stoll, Stoll, Berne,
19 Lokting & Shlachter.

20 MR. OLIVER: Andrew Oliver.

21 THE COURT: And do you want to enter your appearance
22 as the client?

23 MS. HOLM JENSEN: Sure. Paula Holm Jensen, general
24 counsel for Planar Systems.

25 THE COURT: All right. I believe I sent to you all

1 last night a draft case management order. I read a number of
2 materials. First of all, I read your joint status report, and
3 I appreciate that. I have also read the complaint, both in
4 this case and the SpaceCo case. I have read the magistrate
5 judge's opinion on the Markman hearing on the claim
6 construction hearing in Texas, the judge's order adopting that
7 and rejecting Planar's objection to the Markman decision. I've
8 read the motion to dismiss or to transfer that was filed in the
9 Texas case by Planar and the judge's decision on that.

10 I think where my thinking is, but I'll let you all
11 respond to it, is that I want to follow the local rules that
12 I'm used to in this district. They generally have been
13 modified by me, but they are pretty close to the
14 Northern District of California's, but that's what I have been
15 doing in the few patent cases that I've had. I have not had
16 that many patent cases, but these are the local rules that I
17 think are fair and reasonable and that I'm used to.

18 I do understand that the Eastern District of Texas in
19 this case and, frankly, in some other cases, and I really
20 didn't really focus on it as much until recently appears to
21 have this practice, am I correct, a practice of postponing
22 deciding motions to transfer until after they deal with an
23 awful lot of preliminary matters. I know some of the comments
24 that have been coming down and the orders that have been coming
25 down from the Federal Circuit -- by the way, I note that Planar

1 comments in their joint status report that that also violates
2 the Fifth Circuit precedent, although I didn't see any
3 Fifth Circuit cases cited to me, so I'm not really aware of
4 those. But I really wasn't aware that that has been ongoing in
5 the Eastern District of Texas. I just didn't know about it.

6 But that said, now that the case is transferred here,
7 given that we already have a claim construction resolution, and
8 I know that the Court in Texas tried to make it consistent with
9 claim construction decisions that they've previously issued in
10 earlier decisions on comparable patents, or at least the same
11 '978 patent, from the Ergotron case, I don't think I'm prepared
12 to fuss around with that claim construction hearing. I think
13 it is what it is. The Court has tried to make it consistent
14 among a number of cases involving the same patents, including
15 across time. I do think that the federal judge in Texas
16 carefully considered Planar's one objection to that and has
17 rejected it, and I'm not planning on second-guessing that.

18 I understand there has been some discovery deadlines
19 perhaps that have been met and passed in the Texas matter. I
20 know that you all have some disputes regarding what should or
21 shouldn't be allowed to be reopened now that the case has been
22 transferred here. My objective is to try to get the right
23 answer, notwithstanding the fact that I'm not going to
24 second-guess the claim construction hearing; I'm going to
25 assume that's the right answer, but I want to make sure that

1 justice is done. I take very seriously Rule 1 and the
2 obligation of the courts and the parties now working together
3 under our new amendments. It is quite clear to reach a speedy,
4 just, and inexpensive resolution. I know that in patent
5 litigation "speedy" and "inexpensive" may be relative terms,
6 but that's okay. But I want to make sure we get a just
7 resolution, which means getting the answers right. To the
8 extent that means some parties may get, as I think as plaintiff
9 put it, a "redo" of certain things in their expert opinion
10 reports, I am going to allow that. You have seen the proposed
11 schedule that I have.

12 I do want to talk to you and hear your opinions about
13 this schedule, because I think as you've seen from what I sent
14 last night, it doesn't really match what either side has
15 requested. I know that plaintiff has asked for a trial date as
16 soon as possible, as soon as maybe April or May. I know that
17 plaintiff has the SpaceCo case going to trial in Denver in
18 June. I assume it is going to be the same trial team from
19 plaintiff.

20 I know that the defendant has asked for a trial date
21 in July, or preferably even September, noting my preference
22 that I am not going to schedule trials now for next August.
23 Just personally I try to take a significant vacation every
24 other August in odd-numbered years, so I am really trying to
25 keep August reserved for my ability to take a family vacation.

1 I looked at the proposed schedules that you have all
2 submitted. Looking at the defendant's proposed schedule of how
3 long you have to do various items, there is no way that if I
4 give you all of those dates we could have a trial ready before
5 September or even October under those dates. So what you will
6 see that I have done is I selected a date that works well for
7 my calendar in July, basically starting a seven-day jury trial
8 on July 17th, 2017 and then pretty much work backwards.

9 By the way, I have selected seven days. By the way,
10 I know plaintiff says five days. I know that SpaceCo is
11 scheduled for four days. It is totally fine with me, folks, if
12 you do this in four or five days. But right now my July 2017
13 trial calendar is relatively open. It is a lot easier for me
14 to set this for a seven-day jury trial. To the extent that you
15 only take four or five days, I will assure you that I will have
16 plenty of good work to do in that intervening time, and
17 taxpayer money will not be wasted. It will be a lot easier if
18 we do it this way than if I were to set this for a four- or
19 five-day trial, set other things around it as time progresses,
20 and then if you all tell me that you've miscalculated, that you
21 really do need six days or seven days for trial, it may be a
22 lot more disruptive to fit it in then. So I am going to set it
23 for seven days. Feel free to use less.

24 So I started working backwards. What I normally do
25 is have a significant pretrial conference a week, sometimes two

1 weeks before the trial date. When I first put together my
2 draft of this schedule and worked backwards, that put too much
3 pressure on other things. So I figure we can have a pretrial
4 conference six days before the trial, get an awful lot
5 accomplished. To the extent that we will need a second
6 pretrial conference, we will schedule that three days later in
7 between the first and the trial date.

8 Then there is an awful lot of things that have to be
9 done -- at least the way I run my pretrial conferences -- by
10 the parties before the pretrial conference so I can be fully
11 prepared to make significant, substantive rulings. I pretty
12 much get this case fully packaged and ready to go to the
13 jury -- that oftentimes includes jury instructions -- at the
14 pretrial conference.

15 So I'm then working backwards along the various
16 things that you have suggested and requested. I think it was
17 mostly Planar that asked for larger chunks of time between the
18 various items, but it just didn't work to get us where we
19 needed to get to have a trial in July. It really would have
20 forced a trial in September. I thought that really wouldn't be
21 fair to the plaintiffs, who filed the case back in 2014 and
22 wanted a trial sooner rather than later. So my compromise was
23 July, and that means I am going to have to condense or compress
24 a number of other dates.

25 I don't think that anything is particularly

1 unrealistic or extremely burdensome, but I'll be glad to let
2 you tell me whether I've missed something or think there is
3 some tweaks or modifications that you think I really should
4 consider.

5 Then for the pretrial documents that need to be
6 filed, I thought it would make most sense, both in terms of
7 your efficiencies and economies for both parties, if you know
8 what my rulings are going to be on summary judgment and/or
9 Daubert before you have to start filing your pretrial
10 documents. So I don't give you much time in this compressed
11 schedule, but at least this is structured so you will have my
12 rulings at least four days -- maybe sooner -- before the first
13 wave of pretrial documents have to come in.

14 So that means we will probably be looking at an oral
15 argument or an evidentiary hearing on any summary judgment or
16 Daubert motions on May 8, 2017. And from that point, I then
17 work backwards from there to allow each side to have an
18 appropriate or a reasonable amount of time to file their
19 motions, oppositions, and replies. It is not as much as some
20 of you have requested, but I think it is reasonable. It is not
21 uncommon in this district to have these types of schedules.

22 Then, of course, one has to assume that discovery
23 needs to close before the deadlines for filing summary judgment
24 and Daubert, both expert discovery and fact discovery. So I
25 then worked backwards from that period to end up at the draft

1 schedule that I've presented to you all.

2 So that's the thinking behind this. You are welcome
3 to try to talk me into a different approach, but hopefully you
4 will see that I've given this a fair amount of thought. I have
5 read everything that you all have provided so we can talk about
6 what we need to do.

7 I do have a technical question, because I'm just not
8 that familiar with it. You will see in item 16 I have put in,
9 as defendant requested, a deadline for defendant to comply with
10 Section 282(c) of Title 35 of the United States Code.

11 Could someone talk to me about what really that means
12 practically, logically, and legally

13 State your name before speaking.

14 MR. OLIVER: This is Andrew Oliver for defendant.

15 That section of the code just states that any party
16 that is going to present an invalidity defense at trial -- and
17 I'm paraphrasing; I can't quote it exactly -- but any party who
18 is going to present a patent invalidity defense at trial has to
19 file a disclosure identifying certain things about certain
20 prior art that they are going to use, and if you don't file
21 that disclosure, essentially the invalidity defense is waived.

22 THE COURT: And it struck me -- and this is part of
23 what is motivating my question -- I assume one would have to
24 disclose invalidity contentions or defenses way before then so
25 that that can be explored in discovery and even motion

1 practice.

2 So what am I missing here?

3 MR. OLIVER: I think this is probably a remnant of a
4 time before many district courts adopted patent local rules and
5 a remnant of a time from when close of discovery was compressed
6 closer to trial, and so they wanted to make sure that if
7 somebody was hanging on and not answering a contention
8 interrogatory about invalidity defenses, that it would be set
9 in stone before trial, I think.

10 THE COURT: I am expecting, if and when on June 23rd,
11 2017, defendant complies with 35 U.S.C. 282(c), nothing they
12 say will be a surprise to plaintiff, and plaintiff will have
13 had a full opportunity for discovery, including motion practice
14 on those issues.

15 Am I correct? And do we need to do something
16 different here?

17 MR. EDMONDS: Your Honor, I have been doing patent
18 litigation for about 20 years. I remember this statute. I
19 think it is essentially a nullity at this point in time. There
20 are cases -- I didn't know it would be a question -- but there
21 are cases where a plaintiff has tried to jam a defendant
22 because they didn't make that disclosure, and the courts have
23 said, no, the fact disclosures and expert disclosures suffice
24 for this.

25 Because we have fact discovery deadline, because we

1 have an expert deadline, I don't think there is a need for this
2 deadline. I don't see it on scheduling orders anymore. It is
3 really not used. I think your point is well taken. It would
4 be, if anything, redundant, and, at worst, I guess a "gotcha"
5 if somebody forgot to do it, and that's not what we have in
6 mind.

7 MR. MANSFIELD: If I could chime in for a second. It
8 is also not a last date that you can wait to disclosure
9 invalidity. I have had people try this before -- if someone
10 has a different view of the law, obviously state it. You can't
11 just sandbag it and just do it then if there are requirements
12 that you do it before.

13 THE COURT: So I would like to take out, Item 16,
14 because it just reads strange to me in this context. If
15 somebody feels a need to build an earlier deadline for doing
16 that, just tell me when it should be, and I will add it.
17 Otherwise, if you can all deal with it through interrogatories,
18 expert reports, or however else you do it, that's fine with me.
19 So if you need me to add it somewhere earlier, I would be glad
20 to. I just don't want anything in here that implies that you
21 can make a brand-new invalidity disclosure on June 23rd. I am
22 sure it is my inexperience with patent cases that makes me
23 think this is weird.

24 MR. OLIVER: In my experience -- and this is not
25 necessarily how the statute reads -- but in my experience this

1 is often more of a narrowing than a broadening. So if somebody
2 files an expert property or an invalidity contention with 100
3 pieces of prior art, and then when it gets time for trial they
4 disclose some subset of that rather than expanding that. But
5 given the discussion we've had, I think defendant is perfectly
6 satisfied with taking it off of the schedule.

7 THE COURT: And I think that you are going to have to
8 start filing pretrial documents well before June 23rd to
9 prepare for our July 11th pretrial conference, we will know
10 exactly what invalidity contentions may or may not have to be
11 addressed well before then.

12 The other matter that I just want to call to your
13 attention since it may be a little bit more unique to either
14 the District of Oregon or me, take a look at Item 1. Although
15 we are reopening discovery later this week, I do add there will
16 be no motions to compel without prior leave of the Court.

17 You may have noticed in the new amendments to the
18 Federal Rules of Civil Procedure generally, but became
19 effective last December, that is now something that has been
20 encouraged in the amendments to Rule 16. I have been doing
21 that pretty much since I took the bench five years ago.

22 My experience has been that parties sometimes don't
23 really take their conferral obligations all that seriously.
24 They will threaten motions to compel or withhold production and
25 then somebody files a really big, thick stack of motion to

1 compel that really should have been able to resolved earlier.
2 So my rule is you can't file any motions to compel without
3 prior leave of the Court. If you want prior leave, contact my
4 courtroom deputy either together on a joint telephone
5 conference or in an e-mail copied to the other side.

6 My courtroom deputy, by the way, today is Trish Hunt.
7 She is filling in this week because my regular courtroom
8 deputy, Mary Austad, is out this week. Contact my regular
9 courtroom deputy. If you don't set it forth in your e-mail,
10 she will probably ask you. She will certainly ask you to set
11 it forth to briefly describe what the dispute is about. If
12 that description adequately sets forth both sides' positions,
13 fine. If not, if it is only the movant's position, we will
14 briefly ask for a responsive e-mail from the respondent what
15 their position is.

16 This is not the time to do a full-blown motion to
17 compel argument via e-mail or with lots of attachments. I just
18 want to get a sense of what the dispute or disputes are about
19 so I can think about it briefly before I hear our telephone
20 conference. Mary will then set up our telephone conference to
21 talk about these disputes, and we will talk our way through it.

22 My experience has been 80 to 90 percent of discovery
23 disputes can be resolved informally, inexpensively, and
24 promptly with these types of telephone conferences. Now, the
25 e-mails you send me will not be part of the appellate record,

1 unless you choose to file it. You will see, even as we get
2 close to trial, I will do some things informally by e-mail. We
3 don't put those in the official court docket, but you are
4 certainly welcome, and I will never be insulted if you think
5 that something is important, and you want to attach an e-mail
6 or e-mail exchange, file it in the docket, and you will have it
7 for appellate purposes.

8 But I try to resolve some disputes that we can
9 informally, quickly, and inexpensively. So we will talk our
10 way through these discovery disputes. If you tell me that you
11 really need to preserve a particular point mostly for appellate
12 purposes, or if there is some real difficult nuances of the law
13 or the facts that mean that you really need and should be given
14 an opportunity to brief it, tell me. I will give you the
15 opportunity to brief it. I have seen occasionally people
16 explain that to me. It is usually dealing with areas like
17 attorney-client privilege or trade secrets or something like
18 that.

19 I will give you the opportunity to brief it, and we
20 will do that. But that basically could take a large stack of
21 motion to compel and reduce it to one to two specific issues.
22 Such things as burdensomeness, proportionality, relevance,
23 reasonableness of a request or a search parameter, we usually
24 can talk about that on the telephone and find an appropriate
25 resolution.

1 If you disagree with my ruling, first of all, it will
2 be on the record, so you'll have a record of that. If you tell
3 me, though, I'm really making a big mistake, and it is an
4 important issue, and you really want an opportunity to brief
5 it, you are welcome to say that. But that will at least narrow
6 down and confine and focus what the real dispute should be
7 about. So that's what I mean by no motions to compel without
8 prior leave.

9 MR. MANSFIELD: Is it safe to assume that any
10 discovery dispute would be subject to this procedure? For
11 instance, if it was a protective order or a dispute over a
12 designation of a document?

13 THE COURT: Yes. Basically no motions relating to
14 discovery issues can be filed without my permission. Obviously
15 if you have a dispute, confer with each other, try to get it
16 resolved. If you can't, call Mary. We will get on the phone.
17 We most likely will get it resolved on the phone. If not, I
18 will give you leave to file what you need to file. By the way,
19 speaking of protective orders, I assume you have a protective
20 order already from Texas.

21 MR. MANSFIELD: If I could maybe speak to that.
22 There is a protective order in Texas. We have an issue, and it
23 has already arisen in circumstances that we don't need to go
24 into. The lead case in Texas you may remember, because it is
25 in your order, is the SpaceCo case. Because that was the lead

1 case, many of the relevant documents and docket entries are in
2 that and have not been transferred to our PACER. I found this
3 out recently when I talked to the clerk. She advised that we
4 consult with you because we obviously need to have those be
5 part of this record, and I don't know how Your Honor wants to
6 handle that. Again, maybe it is just you ask the clerk to call
7 the other clerk or something or maybe you make an order or
8 something. We need to get all of the Markman and the
9 protective order and all of those other things. For instance,
10 right now you can't file a sealed pleading because there is no
11 protective order in our docket.

12 THE COURT: I will ask you all to confer and find the
13 most efficient, cost-effective, reasonable way to accomplish
14 this. And if that means you want to submit to me a new
15 stipulated protective order, submit it to me, and I'll sign it.
16 I don't know exactly what's in the SpaceCo case other than the
17 documents I've looked at. But my guess is, given at least that
18 one of the patents in that litigation isn't even at issue in
19 this case, hopefully we don't have everything that is in that
20 case needing to be imported here.

21 So perhaps what you all can do is figure out what you
22 really need or want in this case and have it refiled. Maybe
23 that's not an easy way or an inexpensive way to do it, in which
24 case tell me what you want. Especially if you all agree on
25 what you want, I will do whatever you want, as long as you all

1 agree it is within reason. But give it some thought as to what
2 is going to be a common sense, efficient way to get us what we
3 need.

4 If it turns out to be that we need to get everything
5 from that case, give me a proposed order. But that doesn't
6 strike me as the best solution, given that we're going to get
7 more than we really need here. But I'll let you all figure
8 that out. If you need to get me a stipulated order, that's
9 fine.

10 By the way, you all know, or John and Jacob can tell
11 you, in this district we do have a model protective order that
12 we typically use. We have a one-tier and a two-tier, depending
13 on whether we're dealing with competitors.

14 My general presumption is if the parties can agree on
15 a form of a stipulated protective order that's different than
16 those, fine, I will give you that, unless it is unreasonable.
17 My bar for unreasonableness is pretty high. But if you
18 disagree, then my default is going to be what's wrong with our
19 local model, either one tier or two tier. And there, the
20 burden is going to be on whoever disagrees with what the local
21 model is. It is not beyond the possibility to say, "Oh, you
22 make a good point. Our local is deficient or can be improved
23 in this respect," and then I will do it your way and maybe even
24 propose that we change our local model.

25 But other than that, I have seen in the olden days

1 people squabble over a few words that really don't make a bit
2 of difference just because each side wants to do it their way
3 or the way they are used to. Then my default is going to be to
4 follow our local model unless it is meaningfully different.

5 The other thing I want to point out to you is Item 6
6 on summary judgment. I have been practicing for a while. I
7 started my practice in 1981. I practiced for four, four and a
8 half years with Main Justice, the U.S. Department of Justice
9 Antitrust Division, and then I moved to Oregon in 1986 and
10 practiced with the Perkins Coie law firm for 25 years and then
11 became a federal judge a little more than five years ago, June
12 of 2011.

13 For those of you who have been practicing a while,
14 you may remember these older concise statements of undisputed
15 facts that were part of summary judgment. I think they are a
16 great idea. They turned out not to be so good and so helpful
17 when the judges don't really enforce them. But when the judge
18 enforces them, they are a beautiful idea, and so I like them.
19 I enforce them.

20 Let me explain to you what I mean. If somebody wants
21 to file a motion for summary judgment or partial summary
22 judgment, that's fine. What you will need to do is convince me
23 of two things obviously: That there is no material facts that
24 are in genuine dispute that require a jury resolution; and
25 looking at these undisputed facts, you are right on the law.

1 Obviously we all know how to fight over legal propositions.

2 So the hard part often comes in figuring out whether
3 there is a genuine dispute. Well, we know that there is
4 background that one side likes to provide or the other side
5 likes to provide to help frame the questions and maybe even try
6 to influence the decision-maker who is on the side of
7 righteousness and justice and who is not. That's fine. I'm
8 not going to stop you from putting that stuff in; I can't do
9 that. But those really aren't critical to deciding a summary
10 judgment motion.

11 So what is critical is if you are going to tell me
12 that you are entitled to summary judgment for a particular
13 claim or even a particular issue, it is going to be because you
14 say there are most likely a handful of key facts that you
15 contend are undisputed. You can give me all of your other
16 background wherever you want to give it to me, probably in your
17 memorandum in support of your motion. But there is going to be
18 a separate document that I require called a concise statement
19 of material undisputed facts where the movant tells me the
20 following three, four, five, six -- whatever -- facts -- one
21 fact at a time/one brick at a time is undisputed and is
22 necessary to resolving the issue. If you want to tell me by
23 way of background that the other side is a horrible company
24 that does all sorts of terrible, mean things, first of all,
25 don't put that in there. But if you have to, put it in your

1 background section. It doesn't belong in the concise statement
2 of undisputed facts, because obviously it is going to be
3 disputed. So put only those things that you really think are
4 undisputed and are necessary to win your motion and give me
5 pinpoint citations to where in the record evidence that you
6 submit I can find proof that it really is undisputed.

7 Then the respondent, in response, in addition to
8 giving me their memorandum where they put in their background
9 how wonderful they are and how terrible the other side is -- by
10 the way, I'm talking about companies; I'm not talking about
11 lawyers. I don't want to hear invective about each other's
12 lawyering. Enough said about that.

13 So the respondent in the concise statement says
14 either that they agree with a specific numbered fact. Let's
15 say movant's concise undisputed No. 1, they either agree or
16 they don't agree, or they can agree for purposes of summary
17 judgment while reserving the opportunity to disagree at trial.
18 But for summary judgment, they don't challenge it for No. 1.
19 Fine. Nothing more needs to be said about No. 1.

20 No. 2, let's suppose they disagree with that fact.
21 They state that they disagree with that fact. They can
22 concisely tell me why they disagree with that fact or why there
23 is a genuine issue. Then they identify specific portions in
24 the evidentiary record that's part of summary judgment either
25 that the movant submitted or that the respondent is going to

1 submit that shows me where there is genuine issue for trial on
2 that particular issue.

3 Or maybe they want to say, "You know, even if you
4 find that the movant's facts are correct or are undisputed,
5 there are some additional facts for why the movant should have
6 his motion denied." Then you would add that to the
7 respondent's concise statement. Now, here, you don't have to
8 convince me obviously that these additional facts are
9 undisputed. You just have to show me that there is at least a
10 genuine issue, a genuine question for those facts that the jury
11 needs to decide. Then obviously I will assume those facts in
12 the light most favorable to the non-moving party.

13 If for whatever reason the original moving party in
14 their reply wants to argue, no, those facts really are
15 undisputed, and it is not the way the respondent says, you're
16 welcome to do it and try to show me why it is not a genuine
17 issue in your reply. More likely what I've seen is the movant
18 in the reply will say that fact is legally irrelevant. "Even
19 if one accepts that fact, it doesn't deprive me of winning the
20 motion for summary judgment or partial summary judgment that I
21 have moved for. Here is why legally." That's the more likely
22 situation.

23 But at least that way it will enable me to very
24 quickly and easily -- that's also a relative term -- figure
25 out: Do we really have genuine issues of fact, or is it just a

1 hard legal question that we need to analyze?

2 By the way, I have left something else out. It is in
3 Item 6, and that is the movant for summary judgment or partial
4 summary judgment has an obligation to send me separately
5 stipulations of fact. Confer with the other side. If it is
6 stipulated for all purposes, fine. If you are not ready to do
7 that, and you are willing to stipulate for purposes of summary
8 judgment, that's fine too. Just make that clear.

9 At least that way when I write up my opinion -- and
10 most of my summary judgment rulings are written, not all, but
11 most are. I at least will be able to take the stipulated facts
12 that you have given me and know, okay, these are part of some
13 background facts that help set the stage that I don't need to
14 worry about digging up evidentiary citations for.

15 So that's what I'm talking about on Item 6 for
16 summary judgment.

17 Daubert motions. All I'll say at this stage -- and I
18 don't have the cite. John, maybe you have it somewhere else.
19 But I have sat by designation on the Ninth Circuit. I wrote a
20 decision -- Nicholle, was that in '14 or '15?

21 LAW CLERK: '14, I think.

22 THE COURT: '14. The name of the case was, I
23 believe, Pomona v. SQM North America from 2014. If you go back
24 and check some of the recent Ninth Circuit decisions on
25 Daubert, that was from 2014.

1 MR. MANSFIELD: 750 F.3d 1036, Pomona v. SQM North
2 America Corporation.

3 THE COURT: Thank you.

4 My recollection is that it was unanimous, and it sets
5 forth how I view Daubert criteria. It obviously is based on
6 Ninth Circuit precedent. Obviously it is now Ninth Circuit
7 precedent. So if you are going to file a Daubert motion, make
8 sure you are aware of that case. Obviously if later
9 Ninth Circuit decisions come out, especially en banc or Supreme
10 Court decisions that affect that analysis, obviously I follow
11 the latest and most binding precedent. But if you want to know
12 how do I view Daubert, that's the best way to see it.

13 Okay. Does anyone want to talk about any of the
14 items or dates or deadlines or issues that I have addressed on
15 the case management order? I have been talking for a while,
16 but I wanted to give you this basic framework. Any issues?

17 Maybe before we do that, although I will give you
18 that opportunity, I've looked at least some of the diagrams
19 from the Markman hearing and the objections, and this doesn't
20 strike me as an extremely technical patent case. I have seen
21 some that were really simple. I had one where the claims I had
22 to construe -- it was on an iPad cover -- where I had to
23 construe top, bottom, flap, and insert said flap. I loved
24 that. That was nice. Then, again, John brought me one about a
25 year or two ago where I had to get into cache coherence. That

1 was more complicated. This one strikes me in the middle.

2 Does anyone disagree?

3 Okay. So I don't think I'm going to need any type of
4 technical tutorial on this technology. Anybody disagree?

5 Okay. I don't know what you are going to do in terms if this
6 case goes to a jury trial in terms of technical tutorial, a
7 demonstrative for the jury, but if so, I would like to see that
8 in advance.

9 I also don't think this case is going to need any
10 type of court-appointed technical expert. I do that in some
11 cases. I don't think I am going to need it in this case.

12 Anybody disagree?

13 Okay. So does anybody want to say anything either
14 about this lawsuit that I may not know or understand that I
15 should know and then does anyone want to express concerns or
16 suggested tweaks on the proposed schedule?

17 I will start with plaintiff.

18 MR. EDMONDS: Your Honor, John Edmonds for the
19 plaintiff. I think mostly questions of clarifications to make
20 sure everybody understands what the rules are going forward.
21 You mention the Northern District's rules. I didn't quite
22 understand how that would work in a case where we would have
23 already passed most of those junctures in the case.

24 THE COURT: Right, I agree. If there is something
25 that I have not built into this schedule, then tell me, and we

1 need to build it in. But I was building this schedule in on a
2 going-forward basis, understanding that the defendant wants the
3 opportunity to revise some of their expert reports, and I am
4 going to give that to them.

5 If there are things that have already happened in
6 this case that are not addressed here that somebody thinks that
7 I better address or I need to address for clarity, you need to
8 tell me.

9 MR. EDMONDS: The rules are the same in Texas, the
10 rules I am talking about. So Patent Rule 3-1, which is
11 infringement disclosures, that deadline has passed. 3-3, which
12 is invalidity contention disclosures, that deadline has passed.

13 Is the Court saying that those deadlines are
14 essentially -- we are not going to worry about those
15 disclosures? We are going to let people supplement expert
16 reports as they see fit at this point? Do we still need to go
17 back and look at those, or do they need to be amended? How
18 does the Court want to address that?

19 THE COURT: What's the defendant's position on that?

20 MR. OLIVER: I guess, from defendant's position, both
21 parties in expert reports disclosed things that were not in the
22 preliminary contention. Plaintiff would probably disagree with
23 this and say that their record was clean and that ours was
24 supplemented, but our position is that they disclosed some
25 significant infringement arguments that were not in the

1 preliminary contentions.

2 So the way we see it, both parties have already
3 supplemented, and the cleanest way to make sure that everybody
4 knows the contentions of the other party is, and there are no
5 surprises, would be a simple contention interrogatory by each
6 party saying disclose your infringement positions or disclose
7 your invalidity positions. Then if there is anything new or
8 any surprises, those will come out in response to that
9 interrogatory.

10 THE COURT: Since I don't know as much about this
11 case as I'm going to know eventually, and I don't know that
12 much about it right now, it strikes me, sort of taking it one
13 small step at a time, that idea makes sense. Both sides, as
14 soon as discovery reopens later this week, should serve
15 appropriate interrogatories.

16 By the way, you'll see in the local rules we do have
17 a local rule that prohibits contention interrogatories. What
18 we mean by that here is something that doesn't apply as closely
19 in patent cases, but I think if you all have an interrogatory
20 to each other that basically says disclose all invalidity
21 contentions or other appropriate types of matters, that will
22 not run afoul of our prohibition of contention interrogatories.

23 You probably should submit to each other whatever
24 interrogatories of that nature you want sooner rather than
25 later. Let's say you really should do it shortly after

1 Labor Day. I don't want to put another deadline here unless
2 you want me to. But my advice is do it sooner rather than
3 later. The other side will respond in 30 days. That will give
4 both sides the opportunity between now and when fact discovery
5 closes on December 23rd, the opportunity to take whatever
6 additional fact discovery may be needed on anything that may be
7 learned or new.

8 I am not going to preclude -- I am not going to
9 decide right now what I'm going to do if someone puts in
10 something new in response to that interrogatory and the other
11 side says, "That is horribly prejudicial. It is terribly
12 unfair. They shouldn't be allowed to do it." Bring that to my
13 attention sooner rather than later.

14 Basically confer with each other. If you can't
15 resolve it, call Mary, and we will talk about it, and we will
16 figure out what to do. One of my questions is going to be, of
17 course, well, since fact discovery doesn't close until
18 December 23rd of this year, you've got plenty of time to take
19 whatever discovery you need on this new issue even if it is a
20 new issue and how are you being unfairly prejudiced. Maybe the
21 answer might be, "Well, we have already deposed so and so on
22 this, and they are not letting me reopen the deposition."
23 Well, that's not going to be a smart move by whoever is not
24 letting somebody reopen a deposition.

25 Maybe the response is, "Well, we have already deposed

1 so and so on this, and they are in this other part of the
2 country. It's an additional expense or burden to go depose
3 them again." If you can't figure out what to do appropriately
4 with each other, call me, and we will talk our way through it
5 and figure something out.

6 But basically I think the solution to this problem is
7 going to be serve your -- for lack of a better term --
8 contention interrogatories sooner rather than later to see what
9 has changed. That will really pin people done. If you think
10 that someone is changing something unreasonably that you are
11 being unfairly and unreasonably prejudiced by, confer with the
12 other side, see if you can work out some mitigation of that
13 prejudice. If not, call me, and we will talk about it. But
14 you are not going to get much relief from the Court if it
15 simply is, "Well, this is something brand-new. The deadline
16 for saying such and such has already passed. Therefore, they
17 shouldn't be allowed to change their mind" -- and I know about
18 the change in counsel -- "but they shouldn't be allowed to say
19 something now that they have new counsel, but thought of
20 something that should have been said earlier."

21 My response to that is going to be, "How are you
22 being unreasonably prejudiced?" If you are, we will figure out
23 a fair and appropriate way to mitigate any unreasonable
24 prejudice, if we can. If we can't, well, then, I'll just deal
25 with what I have to deal with. Most prejudice can be dealt

1 with and can be modified if people act promptly and reasonably,
2 but I think that's the best answer I can give to that question
3 right now in the abstract.

4 MR. EDMONDS: I think all of my questions are
5 covered. As the Court mentioned, we were a couple of weeks
6 from the close of discovery before, so so much had been done.
7 In the Eastern District there is one thing unique about their
8 procedures that are not done even in the Northern District. In
9 the discovery order, there is a provision that essentially
10 says: All sides produce all relevant documents without the
11 need for a request for production. So requests for production
12 simply aren't used. I think we produced 300,000 pages of
13 documents *sua sponte*, if you will.

14 Does the Court envision that the parties will reopen
15 that can of worms? Plaintiff is willing to say we will operate
16 under that rule and produce it under what we have operated for
17 so long.

18 THE COURT: Here is what worries me and let me hear
19 defendant's side as well as your response. I don't like
20 "gotcha" games. So I think it is a wonderful idea for both
21 sides to present all relevant documents. But what I don't want
22 to see happen is I don't want plaintiff to be operating under
23 that rule, defendant then to wait until basically you have to
24 present your documents a few weeks before pretrial conference,
25 and then all of a sudden you spring on them a very important,

1 significant document helpful to the defense that they have
2 never seen before, and your response is, "Well, you have never
3 served me a discovery request and that Eastern District rule
4 doesn't apply in the District of Oregon." That's not fair and
5 appropriate either.

6 Now, what's the best way to deal with that? I'm not
7 sure. Maybe it is a document request, "Please produce all
8 relevant documents." I don't know.

9 What do you all think is the best and fair and
10 efficient way to deal with this, given that I'm not going to
11 let that type of unfair surprise/gotcha/you didn't ask for the
12 documents, so I'm not showing you this key document until right
13 before trial, I'm not going to let that happen.

14 What do you all think is the best way to deal with
15 it?

16 MR. OLIVER: From the defendant's perspective, there
17 has been a lot of production. I think it is good for parties
18 to normally produce the documents that they think are relevant.
19 We do think there are a few categories of documents that we
20 have not seen that are relevant to this case and think that
21 written requests for production need to be served with respect
22 to those.

23 We are likely to serve a broader set of requests for
24 production of documents, fully understanding that the answer to
25 those may be, "We've already produced all of these documents."

1 But we want to make sure the record is clear that where we
2 think documents are relevant, we're not just relying on the
3 opposing party's view of what documents are relevant to the
4 case.

5 THE COURT: So it sounds like what you are
6 suggesting -- it is John, right?

7 MR. EDMONDS: Yes.

8 THE COURT: I'll get back to John in a moment.

9 Maybe both sides should serve document requests on
10 each other. But what I'm not interested in is some type of
11 motion to compel where we asked for so many things that would
12 be so incredibly burdensome, and they are not producing it.
13 Therefore, order them to produce it. I'm not going to let that
14 type of discovery expense be incredibly burdensome. On the
15 other hand, it does protect you so that if they come up with a
16 document that really would have been responsive to your request
17 that they should have produced earlier, they are not going to
18 be able to get it in by saying, "Well, you never asked for that
19 type of information."

20 So craft your document requests and serve them on
21 each other. Obviously anything that has already been exchanged
22 need not be produced and exchanged again obviously. But if you
23 want to make sure you have a catch-all that you have caught all
24 the things that they might reasonably have, go ahead and make
25 sure you ask them for it. But I'm not going to let discovery

1 requests be a weapon by either side to make the other side
2 incur even more expense than they've already incurred to date.

3 John, do you want to be heard further on that?

4 MR. EDMONDS: I mean, the way it works in practice is
5 that a party says you haven't produced this, and you are under
6 a court-ordered obligation to produce it. If the other side
7 disagrees with that, then the Court resolves it. I guess the
8 beauty of that is it doesn't require a redo of that entire
9 process. To me, that would be the more directed process, like
10 Mr. Oliver saying if there is something that they think they
11 haven't received that they should have received, they could
12 say, "You were supposed to produce everything relevant, but we
13 have not received X. We need X." Then we would either
14 produce X, or dispute X, and it should be produced.

15 THE COURT: It doesn't seem like it is that
16 burdensome. If they think you haven't produced X, or they
17 think you haven't produced Y, send a document request to each
18 other. It will either get produced, or there will be some
19 response for why you are not going to produce it. If there is
20 a response, confer. If you can't resolve it, call Mary, and we
21 will talk about it on the telephone. Unless it is incredibly
22 burdensome and lacking in proportionality, I will say produce
23 it when we get there.

24 MR. EDMONDS: A couple of clarifications. So there
25 was an issue that has been alluded to in the briefings about

1 there was a deadline for disclosing opinions of counsel in the
2 past, and one was not disclosed. Planar announced its
3 intention to rely on one. Typically in patent cases there is
4 some deadline for disclosing that type of information so on
5 last day of discovery somebody doesn't drop it. Plus
6 typically, if materiality is an issue, with willfulness, then
7 experts may weigh in on that, so you need to have it disclosed
8 at some point early.

9 We can obviously make requests, like you said,
10 before Labor Day, to get that out. But would we expect to get
11 that information then, or would they be able to sit back?

12 THE COURT: They have to respond to your request.
13 Put it in the form of an interrogatory or a document request.
14 They will have to respond to that.

15 As I understand it, Planar's position is they don't
16 have a direct advice of counsel letter, but they are relying
17 derivatively upon some other advice that was given to -- what's
18 the name?

19 MR. OLIVER: High Grade.

20 THE COURT: High Grade. So you all know what's at
21 issue there.

22 What would be the consequence of the fact that they
23 might not have disclosed that within the Eastern District of
24 Texas's deadline? The answer from the District of Oregon is
25 going to be no consequence. But if there is other advice of

1 counsel, confer among yourselves. If there is something else
2 that you in good faith need to share with them, share it with
3 them. If you want to make sure that all I's are dotted and T's
4 are crossed, send it to them in a document request or
5 interrogatory or both. Then you can explore the dimensions of
6 High Grade and then argue to me later whether or not that type
7 of derivative reliance does or doesn't count legally.

8 MR. EDMONDS: I think I understand. Typically the
9 way it works, one side will claim privilege. Then at some
10 point in the case they say, "Okay. We are going to waive
11 privilege, because we are going to rely on it." It sounds like
12 if they are going to rely on it, it is now or never.

13 THE COURT: Absolutely. I don't let privilege be
14 asserted, either in patent cases or elsewhere, as a sword and a
15 shield, where it is a shield, "We are not going to give you
16 this," and the day before trial, "Oh, we have changed our mind,
17 so now we are doing it." That doesn't work that way. If you
18 assert privilege to something, and it is truly privileged, then
19 you are stuck, and you can't waive privilege on it later,
20 especially if it causes prejudice to the other side, which it
21 almost certainly will unless you change your mind, let's say,
22 within 24 hours.

23 MR. EDMONDS: My last question was, we have taken
24 their 30(b)(6) deposition. For example, it was in the briefing
25 on the 30(b)(6) deposition, the designee said, "We haven't

1 received an opinion of counsel." We have this deposition
2 there. 30(b)(6) testimony is normally binding. I understand
3 the spirit of the Court's rulings here, but the question is:
4 Does the Court have an idea of how we would handle that?
5 Should they notify us, "We have now changed our mind on some of
6 this testimony," or can we assume the testimony we have so far
7 we can rely on as binding?

8 THE COURT: Tell me if I have misunderstood. As I
9 read what you sent to me in your joint status report, it really
10 hasn't changed. "We didn't have a direct advice of counsel
11 letter," and that the respondent didn't understand the question
12 to be, "Do you have some type of derivative reliance on
13 High Grade's reliance?"

14 Am I correct in understanding that's Planar's
15 position?

16 MR. OLIVER: There was a very direct question to him
17 about whether Planar itself had commissioned an opinion of
18 counsel. The question was answered accurately, and there was
19 no follow-up on it.

20 THE COURT: Even if the question was more broadly
21 phrased than that, if that's the person who was answering the
22 question understood it, did Planar retain counsel and ask
23 counsel for an advice of counsel opinion, and the answer was
24 no, and the person answering the question did not believe that
25 the question was saying, "Did Planar rely upon High Grade's

1 counsel's opinion to High Grade," then I don't think it changes
2 the answer, but I do think now, in a relatively loose sense,
3 I'm letting this now come in and be revisited. If they need to
4 re-depose that 30(b)(6) to explore more issues, of course, they
5 will be allowed do that.

6 I'm not treating this as a changed answer
7 necessarily, but nor am I going to deny them the opportunity
8 now to follow up on this question now that, if you will, this
9 misunderstanding has come to light. So if they need to
10 re-depose that 30(b)(6), they are allowed to do that.

11 MR. EDMONDS: Thank you, Your Honor.

12 Those clarifications help us going forward. I
13 appreciate it.

14 THE COURT: You will get a sense that I am sort of
15 very pragmatic. I try to be practical in some of these things.
16 I want both sides to have fair and reasonable opportunities to
17 present their full case, to present their full defense, to not
18 play games with the other side and to not cause unreasonable or
19 unfair prejudice to the other side.

20 That's how I will structure most of my rulings.
21 Hopefully, then we will get a resolution that's reasonably
22 inexpensive, reasonably prompt, but hopefully reasonably just
23 as well.

24 I don't push people to settle cases. I am meeting
25 outside counsel for the first time here. Local counsel here

1 are very experienced. They know their way around these cases,
2 and I assume from what I have been reading that you all are
3 very experienced patent litigators. You know what you are
4 doing. You will know whether you can or can't or should or
5 shouldn't settle this case.

6 I'm not going to order anybody to any type of ADR.
7 If you want the Court's assistance in finding somebody in this
8 building to serve as a settlement judge, contact my courtroom
9 deputy. If both sides agree, we will find someone. My best
10 opinion, and tell me if you all agree or disagree, because I
11 would be interested in all of your perspectives, as experienced
12 patent litigators, I don't think for patent litigation it is a
13 particularly good idea to get a generalist judge, whether it be
14 a district judge or a magistrate judge -- in the District of
15 Oregon. I don't know about the other districts that have
16 specialized folks.

17 But I don't think it would be particularly effective
18 to help you in a patent case to deal with a judicial settlement
19 conference. I think you are better off -- if you want to do a
20 mediation or settlement conference -- to go find someone who
21 both understands patent litigation and maybe even this particular
22 technology in a way that both sides feel comfortable and then
23 go find your own private mediator.

24 Our settlement judges -- -- and I do a number of
25 settlement conference -- we're pretty good at certain types of

1 disputes. I don't think patent litigation is something we have
2 enough experience with to help in a settlement conference.

3 Am I wrong?

4 MR. EDMONDS: Our prior mediation was before retired
5 Judge Ward, who was one of the most experienced patent judges
6 in the country, and it did not bear fruit. So we have already
7 done that.

8 THE COURT: I know there are some differences. I
9 know the products in SpaceCo are different. It may or may not
10 be the case that after everybody sees how the trial turns out
11 in June in SpaceCo, they may want to revisit settlement issues
12 here, or not.

13 By the way, is that a pretty firm trial date?

14 MR. EDMONDS: We have no reason to suspect it is not.

15 THE COURT: Okay. I am going to assume that this
16 case is going to trial on July 17th. Please understand that
17 once we set a calendar with this degree of specificity, I
18 rarely -- not unheard of -- but I rarely, unless there is a
19 really good reason, would start departing from these dates.

20 So if for whatever reason you come to me in early
21 December and say, "By the way, we would like another three or
22 four months to complete discovery and to do this and push our
23 trial date three or four months," even if it is agreed, I
24 probably will not grant it, unless it is a darn good reason. A
25 darn good reason might be that you all were waiting for me that

1 I took long to get you an answer on and therefore it interfered
2 with your ability to meet this schedule. That's a good reason.
3 I will leave to your imagination what other good reasons might
4 be. But you should really assume that these are pretty firm
5 dates.

6 Obviously to the extent that you all can agree among
7 yourselves minor modifications to these dates, as long as they
8 don't involve court hearings or the dates that you have to file
9 things with the Court, you don't need my approval, as long as
10 you agree to it. For example, expert discovery close is
11 February 17th, and one of your experts you want to depose isn't
12 available until February 21st. As long as you agree with each
13 other and document it somehow, even like an e-mail, that you
14 will take expert X's deposition on February 21st, that's fine
15 with me. You don't need to get me involved in it. Do what you
16 want.

17 However, I am expecting to see any motions for
18 summary judgment and Daubert being filed on March 10th. If
19 that's going to be delayed by a day or two, just call Mary and
20 say that you need another day-or-two extension on that. Tell
21 her whether the other side opposes or doesn't oppose. If it is
22 a day-or-two extension and the other side doesn't oppose, Mary
23 will just grant it by minute order. If it is a more
24 significant extension, that will fit into this category of
25 "there better be a good reason," because it will affect the

1 rest of the calendar going forward, or if it is opposed, I will
2 get on the phone with you, and we will deal with it. But
3 that's how we should all treat this schedule, as pretty darn
4 firm.

5 Is there anything else we should talk about now?

6 MR. EDMONDS: None from the plaintiff. Thank you.

7 MR. OLIVER: Nothing from the defendant.

8 THE COURT: All right. It was a pleasure meeting the
9 folks from out of town. It was pleasure seeing John and Jacob
10 again.

11 Have we met before? I don't think we have.

12 MS. HOLM JENSEN: I'm not sure we have. I don't
13 know.

14 THE COURT: I will disclose to you all that I do know
15 Steve Going, although I don't think I have seen him in 20
16 years. He worked as a corporate associate at my old law firm
17 Perkins Coie.

18 When did Steve leave? Do you know?

19 MS. HOLM JENSEN: Oh, goodness. Quite a while ago.

20 THE COURT: I did litigation at the firm. He was a
21 corporate associate. I remember him, but I don't think I have
22 seen him in 20 years.

23 Nice meeting you all. I look forward to working with
24 you. If it doesn't resolve otherwise, we will have an
25 interesting trial.

1 I find that Portland juries for the most part are
2 pretty sophisticated. You may very well find a handful of
3 Ph.D.s in our prospective jury panel between some of the
4 high-tech companies -- not just Planar -- but the other
5 high-tech companies in the area -- one or two or three people
6 from them on our prospective juror pool. Whether you choose to
7 use a peremptory on them, or not, that's your own tactical
8 decision. But we have a pretty sophisticated panel here.

9 Let me tell you this: After civil trial, unless a
10 party disagrees beforehand, and most of time lawyers don't, I
11 invite the jurors who want to come out and meet with the
12 lawyers and the parties to come out and talk to us all. I
13 appreciated that back when I was a trial lawyer, and so I
14 continue that practice.

15 I will moderate that discussion. There will be a few
16 questions that I'll say are off the table. It rarely happens
17 that we get to those. But for the most part, I invite the
18 jurors to -- at the end of the trial -- after the verdict is
19 received, or if it is a hung jury, if the jury is discharged,
20 when we are done with the jury, I will invite those that want
21 to come back and talk to the lawyers and parties to do so in my
22 presence back in the courtroom.

23 My experience has been anywhere from half to
24 three-quarters want to come back. Usually the folks that don't
25 want to come back, they really wanted to come back, but they

1 have other commitments that they want to get to, and then we
2 will have a little dialogue. It is off the record.

3 The lawyers can ask the jurors what they found
4 persuasive, what was not persuasive, what they thought of their
5 lawyering techniques, what they thought of the clarity of the
6 demonstrative evidence, the clarity of their presentations,
7 things like that, and it is usually a pretty interesting
8 discussion.

9 By the way, to help to entice the jurors to want to
10 come back, I say, "The lawyers will ask you questions, or the
11 clients might, and you don't have to answer if you don't want
12 to, but they are very interested in what you have to say. In
13 exchange, you can ask them questions." So I let the jurors ask
14 the parties and the lawyers questions. Again, the lawyers and
15 the parties, they don't have to answer if they don't want to.
16 They can say pass. But we have an interesting dialogue. So I
17 think if we get that far, you will see that we have very
18 conscientious, careful, intelligent jurors here that work their
19 way through disputes.

20 I think patent litigation, maybe patent litigation/
21 antitrust litigation, are some of the difficult things that we
22 ask jurors to do on the civil side, but you will, I think, be
23 impressed with our juror pool out here. That said, I don't
24 have any clue which way it will fall, having smarter jurors
25 than non-smarter jurors. I don't know. But I think you will

1 like trying a case out here.

2 One of the things to think about, but we will wait
3 for you to worry about this, and that's the following: We're
4 planning on a seven-day jury trial. What normally happens is
5 on day one we will probably have our jury selected by
6 lunchtime. You will do your opening statements in the
7 afternoon. Maybe hopefully we will get to at least one or two
8 or three witnesses in the afternoon.

9 From that point forward, we have trial days from 9:00
10 to 5:00, usually about an hour and 15 minutes for lunch, a
11 15-minute break in the morning, a 15-minute break in the
12 afternoon. So in round numbers we generally can get between
13 five and a half to six hours of real witness testimony done
14 during trial on any given regular trial day.

15 If you add up those numbers -- figure we will get an
16 hour or two of testimony on day one, five and a half hours to
17 six hours of testimony on day two, day three, day four. What
18 that means is that this case will get to the jury no later than
19 the early afternoon of day six, because that way they need some
20 time to begin their deliberations and probably day seven to do
21 their deliberations.

22 So when you add up those numbers of available hours,
23 and as you will see in witness statements, I am going to ask
24 each side propounding a witness to give me a realistic estimate
25 of direct examination. Do you think this witness will be a

1 15-minute witness? Or a two-hour witness? Or a four-hour
2 witness? We add up all that time. I then have a rough rule of
3 thumb of maybe to 50 to 75 percent of direct will be used for
4 cross, depending on who the witnesses are, and I add it up.

5 If we're within the ballpark of something that will
6 keep us to a seven-day jury trial, fine, I will leave you
7 alone. Sometimes, and more often than not, when I get people's
8 estimates, ah, they want to try a 15-day trial in a seven-day
9 window. So we're not going to do that.

10 So then what I do, I use a chess clock. Wow, does
11 that work. It works beautifully, because I will give each side
12 a certain number of hours. We will talk about it in advance to
13 make sure it is the right amount. Most of the time it doesn't
14 count for your opening statement. It will never count for your
15 closing argument. It will only count for the times when you
16 are questioning the witnesses, but it includes all of your
17 directs and redirects, your crosses and your recrosses.

18 And one of benefits of that is I don't ever have to
19 worry about somebody asking marginally relevant/marginally
20 irrelevant questions to run down the other side's clock and do
21 something that's going to take longer, because as long as it is
22 only your clock that's ticking, you can take as much time as
23 you want asking marginally relevant questions and repeating
24 oneself over and over and over. So I generally won't interfere
25 with that.

1 But I'm also quite strict saying, if you have 12
2 hours or 15 hours per side, you are not going to get any more
3 than that. Use it as you see fit. What I have noticed is that
4 people are remarkably efficient about that. It makes for very
5 efficient directs and crosses. Frankly, juries prefer it. It
6 means that I don't have to worry about time being wasted, and
7 you all end up trying a much better case because you are being
8 very efficient.

9 We will figure out later whether we should or
10 shouldn't use a chess clock in this case. We will decide that
11 at the pretrial conference. But give some thought to that as
12 you are figuring your estimated times for direct examinations
13 for your witnesses.

14 The other thing, too, if you are going to show videos
15 of perpetuated depositions in lieu of live testimony, I
16 encourage both sides to work together to come up with a good,
17 tightly edited video, because we don't want to put the jury to
18 sleep. A two-hour video of a witness will put them to sleep.

19 In addition, you will probably see -- I used to do it
20 in the beginning, until I changed, we show on the video:
21 Mr. Witness, by whom are you employed? What are your duties?
22 How long have you been at this company? Stuff like that. Who
23 do you report to?

24 A much more efficient way to do it is for the parties
25 to work together in advance and come up with a stipulated

1 paragraph that I will just read to the jury. Members of the
2 jury, we're now going to hear from Mr. So and So or
3 Ms. So and So. Ms. So and So is in the following position.
4 She reports to this and that. She has been doing this position
5 for X number of years, and her testimony is being presented to
6 you because she is the one who actually did the experiment that
7 you have heard that happened on January 2nd, 2008 regarding the
8 such and such polymer, or something like that. Then you can
9 just dive right into that video: So I understand you did the
10 experiment on January 2nd. How did you prepare it?

11 Then the video will show everything. So feel free to
12 think about how this is going to present to the jury and work
13 with each other in advance so you can efficiently and
14 effectively communicate to the jury what you need to
15 communicate with the jury on those issues of video testimony.
16 We can talk about demonstrative exhibits for trial much further
17 down the road.

18 Then the only other question I had for you now, and I
19 guess it is primarily for -- well, it could be for both sides.
20 Does anybody right now anticipate any likely or potential
21 motions for summary judgment or partial summary judgment that
22 you want to alert me to? This is not binding on you. You
23 won't have to file this motion. If you think of others, you
24 are welcome to file others. But anything I should be thinking
25 about in advance?

1 MR. OLIVER: From defendant's perspective, I don't
2 know that there is anything that you need to think about in
3 advance. I believe we are anticipating a motion for summary
4 judgment on laches, and that's related to a case that was filed
5 in 2009 by plaintiff and then dismissed in 2012. I believe
6 that we are anticipating at least one motion for summary
7 judgment of non-infringement on at least one of the patents.

8 I can't say whether that's the full scope, but I
9 don't think that either of those are something you need to be
10 concerned about at this point.

11 THE COURT: John, anything from plaintiff's
12 perspective?

13 MR. EDMONDS: Again, we may talk to them about the
14 infringement. I presume that our opposition to the motion for
15 summary judgment on non-infringement is that it infringes, so
16 that might be something that the Court could take up on
17 uncontested facts.

18 THE COURT: It probably is premature, but does
19 anybody have any expectations right now of a Daubert motion and
20 whether or not we will be needing to hear any evidence at a
21 Daubert motion? Obviously some Daubert motions can be heard on
22 the papers; others require an evidentiary hearing.

23 Based upon the experts you have already seen
24 exchanged, do you think it is likely or not likely we will get
25 a Daubert motion, or not, or is it too early to tell?

1 MR. OLIVER: We have seen in opening reports from
2 each parties, infringements and damages report from the
3 plaintiff and an invalidity report from the defendant. Those
4 may be modified under your schedule. Based on what we have
5 seen from plaintiff, I don't think we are anticipating a
6 Daubert motion. I do note that on a similar analysis there was
7 a Daubert motion filed in the SpaceCo case, but we haven't
8 anticipated filing a Daubert motion on that same point.

9 MR. EDMONDS: We haven't seen their damages report
10 yet, but we don't have anything significant in mind at this
11 point, Your Honor.

12 THE COURT: Thank you very much. It has been a
13 pleasure meeting you. You know I'm here, in case there is
14 anything I can do for you to help make the resolution just,
15 speedy, and inexpensive, knowing that "inexpensive" and
16 "speedy" are relative terms.

17 Thank you all very much.

18 COUNSEL: Thank you, Your Honor.

19 (Recess.)

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4 I certify, by signing below, that the foregoing is a
5 correct transcript of the record of proceedings in the
6 above-entitled cause. A transcript without an original
7 signature, conformed signature, or digitally signed signature
8 is not certified.

9
10 /s/ Dennis W. Apodaca
11 DENNIS W. APODACA, RDR, RMR, FCRR, CRR
12 Official Court Reporter
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August 28, 2016
DATE

COUNSEL: [1] 49/17
 LAW CLERK: [1] 23/20
 MR. EDMONDS: [16] 3/11 11/16
 25/17 26/8 30/3 32/6 33/3 33/23 35/7
 35/22 37/10 39/3 39/13 41/5 48/12
 49/8
 MR. GILL: [1] 3/17
 MR. MANSFIELD: [5] 3/9 12/6 16/8
 16/20 23/25
 MR. OLIVER: [11] 3/19 10/13 11/2
 12/23 26/19 31/15 34/18 36/15 41/6
 47/25 48/25
 MS. HOLM JENSEN: [3] 3/22 41/11
 41/18
 THE COURT: [33] 3/3 3/15 3/20 3/24
 10/21 11/9 12/12 13/6 16/12 17/11
 23/21 24/2 25/23 26/18 27/9 30/17
 32/4 32/7 33/14 34/11 34/19 35/12
 36/7 36/19 37/13 39/7 39/14 41/7
 41/13 41/19 48/10 48/17 49/11

'

'14 [3] 23/20 23/21 23/22
 '15 [1] 23/20
 '978 [1] 5/11

-

--oOo [1] 50/2

/

/s [1] 50/9

1

100 [1] 13/2
 1000 [1] 2/24
 1036 [1] 24/1
 10th [1] 40/18
 11th [1] 13/9
 12 [1] 46/1
 121 [1] 2/6
 15 [2] 44/10 46/2
 15-day [1] 45/8
 15-minute [3] 44/11 44/11 45/1
 1510 [1] 3/6
 16 [3] 10/8 12/13 13/20
 160 [1] 2/9
 1616 [1] 2/3
 17th [3] 7/8 39/16 40/11
 1981 [1] 19/7
 1986 [1] 19/9

2

20 [3] 11/18 41/15 41/22
 2008 [1] 47/7
 2009 [1] 48/5
 2011 [1] 19/12
 2012 [1] 48/5
 2014 [3] 8/21 23/23 23/25
 2016 [3] 1/5 3/1 50/9
 2017 [4] 7/8 7/12 9/16 11/11
 209 [1] 2/11
 21st [2] 40/12 40/14
 23rd [3] 11/10 12/21 28/5
 24 [1] 35/22
 25 [3] 1/5 3/1 19/10
 28 [1] 50/9
 282 [2] 10/10 11/11
 2nd [2] 47/7 47/10

3-1 [1] 26/10
 3-3 [1] 26/11
 30 [6] 28/3 35/24 35/25 36/2 37/4
 37/10
 300,000 [1] 30/12
 301 [1] 2/24
 326-8182 [1] 2/25
 35 [2] 10/10 11/11
 3:16-cv-01510-SI [1] 1/3
 3:16-cv-1510 [1] 3/6

4

400 [1] 2/6

5

50 [1] 45/3
 500 [1] 2/11
 503 [1] 2/25
 5:00 [1] 44/10

7

75 percent [1] 45/3
 750 [1] 24/1
 77057 [1] 2/4

8

80 [1] 14/22
 8182 [1] 2/25

9

90 percent [1] 14/22
 95113 [1] 2/9
 97204 [3] 2/7 2/12 2/24
 975 [1] 2/9
 9:00 [1] 44/9

A

ability [2] 6/25 40/2
 able [4] 14/1 23/11 32/18 34/11
 about [49] 5/5 6/12 10/5 10/11 10/19
 11/8 11/18 14/11 14/18 14/19 14/21
 15/24 16/7 21/10 21/10 21/11 21/12
 21/19 23/14 23/15 24/13 24/24 25/14
 26/10 26/14 27/10 27/12 28/15 29/13
 29/17 30/7 33/21 33/25 36/17 38/15
 41/5 44/2 44/3 44/10 45/12 45/19 46/4
 46/6 47/12 47/16 47/25 48/2 48/10
 48/13

above [1] 50/6
 above-entitled [1] 50/6

Absolutely [1] 35/13

abstract [1] 30/3
 accepts [1] 22/19

accomplish [1] 17/13

accomplished [1] 8/5

accurately [1] 36/18

across [1] 5/15

act [1] 30/1

actually [1] 47/6

add [8] 12/16 12/19 13/15 22/6 44/15

44/22 45/2 45/4

addition [2] 21/7 46/19

additional [4] 22/5 22/8 28/6 29/2

address [3] 26/7 26/7 26/18

addressed [3] 13/11 24/14 26/6

adequately [1] 14/12

adopted [1] 11/4

adopting [1] 4/6

ADR [1] 38/6

advanced [6] 25/8 47/12 46/25 47/13
 47/25 48/3

advice [6] 28/2 34/16 34/17 34/25

36/10 36/23

advised [1] 17/3

affect [2] 24/10 40/25

afoul [1] 27/22

after [5] 4/22 27/25 39/10 42/9 42/18

afternoon [4] 44/7 44/8 44/12 44/19

again [7] 17/6 24/24 29/3 32/22 41/10

43/14 48/13

ago [4] 13/21 19/11 24/25 41/19

agree [13] 17/24 18/1 18/14 21/14

21/15 21/16 21/16 25/24 38/9 38/10

40/6 40/10 40/12

agreed [1] 39/23

ah [1] 45/8

ahead [1] 32/24

alert [1] 47/22

all [58]

allow [2] 6/10 9/17

allowed [6] 5/21 28/12 29/17 29/18

37/5 37/10

alluded [1] 33/25

almost [1] 35/21

alone [1] 45/7

along [1] 8/15

already [14] 5/7 16/20 16/23 25/23 26/5

27/2 28/21 28/25 29/16 31/25 32/21

33/2 39/6 48/23

also [7] 2/13 4/3 5/1 12/8 22/24 25/9

46/1

although [4] 5/2 13/14 24/17 41/15

am [23] 4/21 6/10 6/22 6/24 7/22 8/23

11/2 11/10 11/15 12/21 25/11 26/3

26/10 28/8 28/8 36/14 37/7 37/14

37/24 39/3 39/15 40/17 44/23

amended [1] 26/17

amendments [3] 6/3 13/17 13/20

America [2] 23/23 24/2

Amin [1] 2/8

among [3] 5/14 35/1 40/6

amount [3] 9/18 10/4 45/13

analysis [2] 24/10 49/6

analyze [1] 23/1

and/or [1] 9/8

Andrew [3] 2/8 3/20 10/14

announced [1] 34/2

another [3] 28/1 39/21 40/20

answer [12] 5/23 5/25 28/21 30/2 31/24

34/24 36/23 37/2 37/6 40/1 43/11

43/15

answered [1] 36/18

answering [3] 11/7 36/21 36/24

answers [1] 6/7

anticipate [1] 47/20

anticipated [1] 49/8

anticipating [3] 48/3 48/6 49/5

antitrust [2] 19/9 43/21

any [20] 5/2 9/15 10/15 10/17 14/2 16/9

24/13 24/16 25/3 25/9 27/8 29/23 38/6

40/17 43/24 44/14 46/2 47/20 48/19

48/20

anybody [6] 25/4 25/12 25/13 38/6

47/20 48/19

anymore [1] 12/2

anyone [3] 24/13 25/2 25/15

anything [13] 8/25 12/4 12/20 25/13

27/7 28/6 32/21 41/5 47/24 48/2 48/11

49/10 49/14

anywhere [1] 42/23
 Apodaca [3] 2/23 50/9 50/10
 appearance [1] 3/21
 appearances [2] 2/1 3/8
 appears [1] 4/20
 appellate [3] 14/25 15/7 15/11
 apply [2] 27/18 31/4
 appointed [1] 25/10
 appreciate [2] 4/3 37/13
 appreciated [1] 42/13
 approach [1] 10/3
 appropriate [6] 9/18 15/24 27/15 27/21
 29/23 31/5
 appropriately [1] 29/3
 approval [1] 40/9
 April [1] 6/16
 are [106]
 area [1] 42/5
 areas [1] 15/16
 aren't [2] 20/9 30/12
 argue [2] 22/14 35/6
 argument [3] 9/15 14/17 45/15
 arguments [1] 26/25
 arisen [1] 16/23
 around [3] 5/12 7/19 38/1
 art [2] 10/20 13/3
 as [52]
 ask [15] 3/8 14/10 14/10 14/14 17/6
 17/12 31/11 32/25 36/22 43/3 43/10
 43/13 43/13 43/22 44/23
 asked [5] 6/15 6/20 8/17 32/11 32/18
 asking [2] 45/19 45/23
 assert [1] 35/18
 asserted [1] 35/14
 assistance [1] 38/7
 associate [2] 41/16 41/21
 assume [11] 5/25 6/18 9/22 10/23 16/9
 16/19 22/11 36/6 38/2 39/15 40/4
 assure [1] 7/15
 attach [1] 15/5
 attachments [1] 14/17
 attention [2] 13/13 28/13
 attorney [1] 15/17
 attorney-client [1] 15/17
 August [6] 1/5 3/1 6/22 6/24 6/25 50/9
 Austad [1] 14/8
 available [2] 40/12 44/22
 Avenue [1] 2/24
 aware [3] 5/3 5/4 24/8
 awful [3] 4/23 8/4 8/8

B

back [12] 8/21 23/23 26/17 32/8 34/11
 42/13 42/21 42/22 42/24 42/25 42/25
 43/10
 background [6] 20/4 20/16 20/23 21/1
 21/8 23/13
 backwards [6] 7/8 7/24 8/2 8/15 9/17
 9/25
 ballpark [1] 45/5
 banc [1] 24/9
 bar [1] 18/17
 based [3] 24/5 48/23 49/4
 basic [1] 24/16
 basically [7] 7/7 15/20 16/13 27/20
 28/14 29/6 30/23
 basis [1] 26/2
 be [100]
 bear [1] 39/6

beautiful [1] 19/10
 beautifully [1] 45/11
 beauty [1] 33/8
 became [2] 13/18 19/11
 because [23] 6/13 10/7 11/22 11/25
 11/25 12/14 14/7 16/24 16/25 17/4
 17/10 19/2 20/13 21/2 35/11 38/10
 40/25 44/19 45/11 45/21 46/7 46/17
 47/6
 been [29] 4/12 4/14 4/24 4/24 5/4 5/18
 5/19 5/21 11/17 13/19 13/20 13/22
 14/1 14/22 17/2 19/6 19/13 24/15
 29/20 30/6 31/17 32/16 32/21 33/25
 38/2 42/23 46/22 47/4 49/12
 before [26] 1/15 7/4 8/1 8/4 8/10 9/9
 9/12 9/23 10/13 10/24 11/4 11/9 12/9
 12/12 13/8 13/11 14/19 24/17 30/6
 30/24 31/2 31/13 34/10 35/16 39/4
 41/11
 beforehand [1] 42/10
 begin [1] 44/20
 beginning [1] 46/20
 behalf [1] 3/16
 behind [1] 10/2
 being [7] 28/20 29/11 29/22 40/18 46/6
 46/7 47/5
 believe [5] 3/25 23/23 36/24 48/3 48/5
 belong [1] 21/1
 below [1] 50/4
 bench [1] 13/21
 benefits [1] 45/18
 Berne [2] 2/11 3/18
 best [7] 18/6 24/12 30/2 31/6 31/9
 31/14 38/9
 better [5] 26/7 29/7 38/19 40/25 46/7
 between [5] 8/7 8/17 28/4 42/3 44/12
 beyond [1] 18/21
 big [2] 13/25 16/3
 binding [4] 24/11 36/2 36/7 47/22
 bit [2] 13/13 19/1
 blown [1] 14/16
 both [18] 4/3 9/6 9/7 9/24 14/12 26/20
 27/2 27/13 28/4 30/20 32/9 35/5 37/16
 38/9 38/21 38/22 46/16 47/19
 bottom [1] 24/23
 brand [2] 12/21 29/15
 brand-new [2] 12/21 29/15
 break [2] 44/11 44/11
 brick [1] 20/21
 brief [4] 15/14 15/15 15/19 16/4
 briefing [1] 35/24
 briefings [1] 33/25
 briefly [3] 14/11 14/14 14/19
 Bring [1] 28/12
 broadening [1] 13/1
 broader [1] 31/23
 broadly [1] 36/20
 brought [1] 24/24
 build [2] 12/15 26/1
 building [2] 26/1 38/8
 built [1] 25/25
 burden [2] 18/20 29/2
 burdensome [5] 9/1 32/12 32/14 33/16
 33/22
 burdensomeness [1] 15/22

C

cache [1] 24/25
 calendar [4] 7/7 7/13 39/17 41/1
 California [1] 2/9

California [1] 1/1
 call [8] 13/12 16/16 17/6 28/15 29/4
 29/13 33/20 40/19
 called [1] 20/18
 can [42] 8/3 8/10 10/5 10/25 12/8
 12/17 12/21 14/19 14/23 15/8 15/24
 16/14 17/21 18/10 18/14 18/22 20/15
 21/6 21/16 21/21 29/12 29/24 29/25
 30/1 30/2 30/15 34/9 35/5 36/6 36/7
 38/4 40/6 43/3 43/13 43/16 44/12
 45/22 47/8 47/13 47/16 48/21 49/14
 can't [13] 10/17 12/10 14/2 16/16 17/10
 20/8 28/14 29/3 29/24 33/20 35/19
 38/4 48/8
 careful [1] 43/18
 carefully [1] 5/16
 case [49] 3/5 3/6 3/6 4/1 4/4 4/4 4/9
 4/19 5/6 5/11 5/21 6/17 8/12 8/21
 16/24 16/25 17/1 17/16 17/19 17/20
 17/22 17/24 18/5 23/22 24/8 24/15
 24/20 25/6 25/9 25/11 25/22 25/23
 26/6 27/11 31/20 32/4 35/10 37/17
 38/5 38/18 39/10 39/16 44/1 44/18
 46/7 46/10 48/4 49/7 49/13
 cases [14] 4/15 4/16 4/19 5/3 5/14
 11/20 11/21 12/22 25/11 27/19 34/3
 35/14 37/24 38/1
 catch [1] 32/23
 catch-all [1] 32/23
 categories [1] 31/19
 category [1] 40/24
 caught [1] 32/23
 cause [2] 37/18 50/6
 causes [1] 35/20
 certain [5] 6/9 10/19 10/19 38/25 45/12
 certainly [3] 14/10 15/4 35/21
 certified [1] 50/8
 certify [1] 50/4
 challenge [1] 21/18
 chambers [1] 3/3
 change [4] 18/24 29/17 29/18 35/21
 changed [6] 29/9 35/16 36/5 36/10 37/6
 46/20
 changes [1] 37/1
 changing [1] 29/10
 check [1] 23/24
 chess [2] 45/10 46/10
 chime [1] 12/7
 choose [2] 15/1 42/6
 chunks [1] 8/17
 Circuit [8] 4/25 5/2 5/3 23/19 23/24
 24/6 24/6 24/9
 circumstances [1] 16/23
 citations [2] 21/5 23/14
 cite [1] 23/18
 cited [1] 5/3
 civil [3] 13/18 42/9 43/22
 claim [7] 4/5 5/7 5/9 5/12 5/24 20/13
 35/9
 claims [1] 24/21
 Clara [1] 2/9
 clarifications [3] 25/19 33/24 37/12
 clarity [3] 26/7 43/5 43/6
 clean [1] 26/23
 cleanest [1] 27/3
 clear [3] 6/3 23/8 32/1
 clerk [3] 17/3 17/6 17/7
 client [2] 3/22 15/17
 clients [1] 43/11
 clock [4] 45/10 45/20 45/22 46/10

close [7] 4/13 9/23 11/5 15/2 28/17
30/6 40/10
closely [1] 27/18
closer [1] 11/6
closes [1] 28/5
closing [1] 45/15
clue [1] 43/24
code [2] 10/10 10/15
coherence [1] 24/25
Coie [2] 19/10 41/17
Collins [3] 2/3 3/12 3/14
come [16] 9/13 24/9 27/8 32/15 37/3
37/9 39/20 42/11 42/12 42/21 42/24
42/25 42/25 43/10 46/16 46/25
comes [1] 20/2
comfortable [1] 38/22
coming [2] 4/24 4/24
comments [2] 4/23 5/1
commissioned [1] 36/17
commitments [1] 43/1
common [1] 18/2
communicate [2] 47/14 47/15
companies [3] 21/10 42/4 42/5
company [2] 20/23 46/22
comparable [1] 5/10
compel [8] 13/16 13/24 14/1 14/2 14/17
15/21 16/7 32/11
competitors [1] 18/13
complaint [1] 4/3
complete [1] 39/22
complicated [1] 25/1
complies [1] 11/11
comply [1] 10/9
compress [1] 8/23
compressed [2] 9/10 11/5
compromise [1] 8/22
concerned [1] 48/10
concerns [1] 25/15
concise [6] 19/14 20/18 21/1 21/13
21/15 22/7
concisely [1] 21/22
condense [1] 8/23
confer [7] 16/15 17/12 23/5 28/14
29/11 33/20 35/1
conference [17] 1/13 3/7 7/25 8/4 8/6
8/10 8/14 13/9 14/5 14/20 14/20 30/24
38/19 38/20 38/25 39/2 46/11
conferences [2] 8/9 14/24
conferral [1] 13/23
confine [1] 16/6
conformed [1] 50/7
conscientious [1] 43/18
consequence [2] 34/22 34/25
consider [1] 9/4
considered [1] 5/16
consistent [2] 5/8 5/13
construction [5] 4/6 5/7 5/9 5/12 5/24
construe [2] 24/22 24/23
consult [1] 17/4
contact [3] 14/3 14/8 38/8
contend [1] 20/15
contention [8] 11/7 13/2 26/12 26/22
27/5 27/17 27/22 29/8
contentions [5] 10/24 13/10 27/1 27/4
27/21
context [1] 12/14
continue [1] 42/14
convince [2] 19/22 22/8
copied [1] 14/5

corporate [14] 11/6 41/21
Corporation [1] 24/2
correct [5] 4/21 11/15 22/4 36/14 50/5
cost [1] 17/13
cost-effective [1] 17/13
could [8] 7/4 10/11 12/7 15/20 16/21
33/11 47/19 48/16
counsel [15] 3/3 3/24 29/18 29/19 34/1
34/16 35/1 36/1 36/10 36/18 36/22
36/23 36/23 37/25 37/25
counsel's [1] 37/1
count [4] 35/7 45/14 45/14 45/15
country [2] 29/2 39/6
couple [2] 30/5 33/24
course [3] 9/22 28/17 37/4
court [22] 1/1 1/16 2/23 5/8 5/13 13/16
14/3 15/3 24/10 25/10 26/13 26/18
29/14 30/5 30/14 33/6 33/7 36/4 40/8
40/9 48/16 50/10
Court's [2] 36/3 38/7
court-appointed [1] 25/10
court-ordered [1] 33/6
Courthouse [1] 2/23
courtroom [6] 14/4 14/6 14/7 14/9 38/8
42/22
courts [3] 6/2 11/4 11/22
cover [1] 24/22
covered [1] 30/5
craft [1] 32/20
criteria [1] 24/5
critical [2] 20/9 20/11
cross [1] 45/4
crossed [1] 35/4
crosses [2] 45/17 46/5
CRR [2] 2/23 50/10
cv [2] 1/3 3/6

D

damages [2] 49/2 49/9
darn [3] 39/24 39/25 41/3
date [10] 6/15 6/20 7/6 8/1 8/7 12/8
33/2 39/13 39/23 50/10
dates [8] 7/4 7/5 8/24 24/14 39/19 40/5
40/7 40/8
Daubert [16] 9/9 9/16 9/24 23/17 23/25
24/5 24/7 24/12 40/18 48/19 48/21
48/21 48/25 49/6 49/7 49/8
day [22] 7/7 7/14 7/19 28/1 34/5 34/10
35/16 40/19 40/20 40/22 44/4 44/5
44/14 44/16 44/17 44/17 44/17 44/19
44/20 45/6 45/8 45/8
day-or-two [2] 40/20 40/22
days [14] 7/9 7/10 7/11 7/12 7/15 7/21
7/21 7/23 8/4 8/6 9/12 18/25 28/3 44/9
deadline [12] 10/9 11/25 12/1 12/2
12/15 26/11 26/12 28/1 29/15 34/1
34/4 34/24
deadlines [4] 5/18 9/23 24/14 26/13
deal [9] 4/22 12/17 29/24 29/25 31/6
31/10 31/14 38/18 41/2
dealing [2] 15/16 18/13
dealt [1] 29/25
December [4] 13/19 28/5 28/18 39/21
December 23rd [1] 28/5
December 23rd of [1] 28/18
decide [3] 22/11 28/9 46/10
deciding [2] 4/22 20/9
decision [5] 4/7 4/9 20/6 23/20 42/8
decision-maker [1] 20/6
decisions [5] 5/9 5/10 23/24 24/9 24/10

discovery... [10] 28/17 28/19 30/6 30/9
 31/3 32/14 32/25 34/5 39/22 40/10
 discussion [3] 13/5 42/15 43/8
 dismiss [1] 4/8
 dismissed [1] 48/5
 dispute [9] 14/11 14/18 16/6 16/10
 16/11 16/15 19/24 20/3 33/14
 disputed [1] 21/3
 disputes [8] 5/20 14/18 14/21 14/23
 15/8 15/10 39/1 43/19
 disruptive [1] 7/22
 district [20] 1/1 1/2 1/16 2/23 4/12 4/14
 4/18 5/5 9/21 11/4 13/14 18/11 30/7
 30/8 31/3 31/4 34/23 34/24 38/14
 38/14
 District's [1] 25/21
 districts [1] 38/15
 dive [1] 47/9
 Division [1] 19/9
 do [74]
 docket [4] 15/3 15/6 17/1 17/11
 document [12] 16/12 20/18 31/1 31/7
 31/12 32/9 32/16 32/20 33/17 34/13
 35/4 40/13
 documents [18] 9/5 9/10 9/13 13/8 17/1
 17/17 30/10 30/13 30/21 30/24 31/8
 31/12 31/18 31/19 31/24 31/25 32/2
 32/3
 does [13] 20/24 24/13 25/2 25/13 25/15
 26/18 30/14 32/15 35/7 36/4 45/10
 47/20 48/18
 doesn't [17] 6/14 18/5 21/1 22/19 24/19
 27/18 28/17 31/4 33/8 33/15 34/5 35/7
 35/17 40/21 40/22 41/24 45/13
 doing [7] 4/15 11/17 12/15 13/20 35/17
 38/4 47/4
 don't [64]
 done [9] 6/1 7/6 8/9 29/9 30/6 30/8
 39/7 42/20 44/13
 dotted [1] 35/3
 down [5] 4/24 4/25 16/6 45/20 47/17
 draft [3] 4/1 8/2 9/25
 drop [1] 34/5
 during [1] 44/14
 duties [1] 46/21

E

e-mail [8] 14/5 14/9 14/14 14/17 15/2
 15/5 15/6 40/13
 e-mails [1] 14/25
 each [17] 9/17 16/15 19/2 21/11 27/5
 27/20 27/23 28/14 29/4 32/10 32/21
 33/17 40/12 44/24 45/11 47/13 49/2
 earlier [6] 5/10 12/15 12/19 14/1 29/20
 32/17
 early [4] 34/8 39/20 44/19 48/25
 easier [3] 3/7 7/13 7/17
 easily [1] 22/24
 Eastern [5] 4/18 5/5 30/7 31/3 34/23
 easy [1] 17/23
 economies [1] 9/7
 edited [1] 46/17
 Edmonds [6] 2/2 2/3 3/12 3/12 3/14
 25/18
 effective [3] 13/19 17/13 38/17
 effectively [1] 47/14
 efficiencies [1] 9/7
 efficient [7] 17/13 18/2 31/10 46/4 46/5
 46/8 46/24

either [14] 6/14 13/13 14/4 18/19 21/14
 21/15 21/24 25/13 31/5 33/1 33/13
 33/18 35/14 48/9
 else [5] 12/18 23/2 23/18 35/1 41/5
 elsewhere [1] 35/14
 employed [1] 46/21
 en [1] 24/9
 enable [1] 22/23
 encourage [1] 46/16
 encouraged [1] 13/20
 end [3] 9/25 42/18 46/7
 enforce [2] 19/17 19/19
 enforces [1] 19/18
 ENGINEERED [3] 1/3 3/5 3/9
 enough [2] 21/12 39/2
 enter [2] 3/8 3/21
 entice [1] 43/9
 entire [1] 33/8
 entitled [2] 20/12 50/6
 entries [1] 17/1
 envision [1] 30/14
 Ergotron [1] 5/11
 especially [3] 17/24 24/9 35/20
 essentially [4] 10/21 11/19 26/14 30/9
 estimate [1] 44/24
 estimated [1] 46/12
 estimates [1] 45/8
 even [17] 6/21 7/5 10/25 15/1 17/18
 18/23 20/5 20/13 22/3 22/18 28/19
 30/8 33/2 36/20 38/21 39/23 40/13
 eventually [1] 27/11
 ever [1] 45/18
 every [1] 6/23
 everybody [3] 25/20 27/3 39/10
 everyone [2] 3/4 3/8
 everything [5] 10/5 17/19 18/4 33/12
 47/11
 evidence [3] 21/5 43/6 48/20
 evidentiary [4] 9/15 21/24 23/14 48/22
 exactly [3] 10/17 13/10 17/16
 examination [1] 44/25
 examinations [1] 46/12
 example [2] 35/24 40/10
 exchange [2] 15/6 43/13
 exchanged [3] 32/21 32/22 48/24
 exhibits [1] 47/16
 expanding [1] 13/4
 expect [1] 34/10
 expectations [1] 48/19
 expecting [2] 11/10 40/17
 expense [3] 29/2 32/14 33/2
 experience [6] 12/24 12/25 13/22 14/22
 39/2 42/23
 experienced [4] 38/1 38/3 38/11 39/5
 experiment [2] 47/6 47/10
 expert [12] 6/9 9/24 11/23 12/1 12/18
 13/2 25/10 26/3 26/15 26/21 40/10
 40/14
 experts [3] 34/7 40/11 48/23
 explain [2] 15/16 19/20
 explore [2] 35/5 37/4
 explored [1] 10/25
 express [1] 25/15
 extension [3] 40/20 40/22 40/24
 extent [4] 6/8 7/14 8/5 40/6
 extremely [2] 9/1 24/20

F

F.3d [1] 24/1

fact [1] 5/5 9/24 11/23 11/25 20/21
 21/14 21/20 21/21 21/22 22/18 22/19
 22/25 23/5 28/4 28/6 28/17 34/22
 facts [17] 15/13 19/15 19/23 19/25
 20/14 20/19 20/20 21/2 22/4 22/5 22/8
 22/10 22/11 22/14 23/11 23/13 48/17
 fair [7] 4/17 8/21 10/4 29/23 31/4 31/9
 37/16
 faith [1] 35/2
 fall [1] 43/24
 familiar [1] 10/8
 family [1] 6/25
 far [2] 36/6 43/17
 favorable [1] 22/12
 FCRR [2] 2/23 50/10
 February [3] 40/11 40/12 40/14
 February 17th [1] 40/11
 February 21st [2] 40/12 40/14
 federal [4] 4/25 5/15 13/18 19/11
 feel [3] 7/23 38/22 47/11
 feels [1] 12/15
 few [5] 4/15 19/1 30/24 31/19 42/15
 Fifth [2] 5/2 5/3
 Fifth Circuit [1] 5/3
 fight [1] 20/1
 figure [10] 8/3 17/21 18/7 22/24 28/16
 29/3 29/5 29/22 44/15 46/9
 figuring [2] 20/2 46/12
 file [14] 9/18 10/19 10/20 14/2 15/1
 15/6 16/18 16/18 17/10 19/21 24/7
 40/8 47/23 47/24
 filed [7] 4/8 8/21 9/6 16/14 40/18 48/4
 49/7
 files [2] 13/2 13/25
 filing [4] 9/9 9/23 13/8 49/8
 filling [1] 14/7
 find [9] 15/24 17/12 21/6 22/4 38/9
 38/20 38/23 42/1 42/2
 finding [1] 38/7
 fine [12] 7/11 12/18 14/13 18/9 18/16
 19/22 20/7 21/19 23/6 23/8 40/14 45/6
 firm [6] 19/10 39/13 40/4 41/4 41/16
 41/20
 first [7] 4/2 8/1 8/7 9/12 16/1 20/24
 37/25
 fit [4] 7/22 26/16 40/24 46/3
 five [9] 7/10 7/12 7/15 7/19 13/21 19/11
 20/20 44/13 44/16
 five-day [1] 7/19
 flap [2] 24/23 24/23
 focus [2] 4/20 16/6
 folks [5] 3/9 7/11 38/16 41/9 42/24
 follow [5] 4/11 19/4 24/10 36/19 37/8
 follow-up [1] 36/19
 following [3] 20/20 44/3 47/3
 forced [1] 8/20
 foregoing [1] 50/4
 forgot [1] 12/5
 form [2] 18/15 34/13
 forth [4] 14/9 14/11 14/12 24/5
 forward [6] 25/20 26/2 37/12 41/1
 41/23 44/9
 found [2] 17/2 43/3
 four [12] 7/11 7/12 7/15 7/18 9/12 19/7
 19/7 20/20 39/22 39/23 44/17 45/1
 four-hour [1] 45/1
 frame [1] 20/5
 framework [1] 24/16
 frankly [2] 4/19 46/5
 free [2] 7/23 47/11

fruit [1] 39/6
full [5] 11/13 14/16 37/17 37/17 48/8
full-blown [1] 14/16
fully [3] 8/10 8/12 31/24
further [2] 33/3 47/16
fuss [1] 5/12

G

games [2] 30/20 37/18
general [2] 3/23 18/14
generalist [1] 38/13
generally [4] 4/12 13/18 44/12 45/24
genuine [8] 19/24 20/3 21/23 22/1
22/10 22/10 22/16 22/25
get [41] 5/22 6/6 6/8 8/4 8/12 8/18 8/19
14/18 15/1 16/15 16/16 16/17 17/8
18/2 18/4 18/6 18/8 24/25 29/14 32/8
32/18 33/18 33/23 34/10 34/10 37/14
37/21 38/13 40/1 40/15 41/2 42/17
43/1 43/17 44/7 44/12 44/15 44/18
45/7 46/2 48/24
gets [1] 13/3
getting [1] 6/7
Gill [2] 2/10 3/18
give [20] 7/4 9/10 15/14 15/19 16/18
18/1 18/5 18/16 20/15 20/16 21/4
24/16 24/17 26/4 28/3 30/2 35/15
44/24 45/11 46/11
given [10] 5/7 10/4 13/5 15/13 17/17
18/6 23/12 31/10 34/17 44/14
giving [1] 21/8
glad [2] 9/1 12/19
go [8] 8/12 16/23 23/23 26/16 29/2
32/24 38/20 38/23
goes [1] 25/6
going [69]
going-forward [1] 26/2
good [15] 3/4 7/16 18/22 19/16 31/17
35/2 38/13 38/25 39/19 39/24 39/25
40/2 40/3 40/25 46/16
goodness [1] 41/19
got [1] 28/18
gotcha [3] 12/4 30/20 31/11
Grade [4] 34/19 34/20 35/6 37/1
Grade's [2] 36/13 36/25
grant [2] 39/24 40/23
great [1] 19/16
guess [6] 5/24 12/4 17/17 26/20 33/7
47/19
guessing [1] 5/17

H

had [12] 4/15 4/15 11/13 12/9 13/5
24/21 24/21 24/22 24/25 30/6 36/17
47/18
half [4] 19/8 42/23 44/13 44/16
hand [1] 32/15
handful [2] 20/14 42/2
handle [2] 17/6 36/4
hanging [1] 11/7
happen [2] 30/22 31/13
happened [2] 26/5 47/7
happens [2] 42/16 44/4
hard [2] 20/2 23/1
has [29] 5/4 5/13 5/16 5/18 5/21 6/14
6/15 6/17 6/20 9/22 10/18 11/21 12/10
13/19 13/22 14/22 16/23 23/4 26/11
26/12 29/9 29/16 31/17 32/21 33/25
37/9 42/23 47/4 49/12

haven't [7] 33/5 33/11 33/16 33/17
35/25 49/7 49/9
having [1] 43/24
He [2] 41/16 41/20
hear [6] 6/12 14/19 21/11 30/18 47/2
48/20
heard [3] 33/3 47/7 48/21
hearing [7] 4/5 4/6 5/12 5/24 9/15
24/19 48/22
hearings [1] 40/8
help [7] 20/5 23/13 37/12 38/18 39/2
43/9 49/14
helpful [2] 19/16 31/1
her [2] 40/21 47/5
here [24] 3/5 3/16 5/6 5/22 11/2 11/16
12/20 17/20 18/7 22/7 22/21 26/6
27/18 28/1 30/18 36/3 37/25 37/25
39/12 42/8 43/18 43/23 44/1 49/13
high [9] 18/17 34/19 34/20 35/6 36/13
36/25 37/1 42/4 42/5
High Grade [1] 34/19
High Grade's [1] 36/13
high-tech [2] 42/4 42/5
him [4] 36/16 41/15 41/21 41/22
his [1] 22/6
Holm [2] 2/13 3/23
Honor [6] 11/17 17/5 25/18 37/11 49/11
49/18
HONORABLE [1] 1/15
hopefully [5] 10/3 17/19 37/21 37/22
44/7
horrible [1] 20/23
horribly [1] 28/11
hour [5] 44/10 44/16 45/1 45/1 46/18
hours [8] 35/22 44/13 44/16 44/17
44/22 45/12 46/2 46/2
Houston [1] 2/4
how [19] 7/2 12/25 17/5 20/1 21/9 21/9
24/5 24/12 25/22 26/17 28/20 29/21
36/4 37/20 39/10 41/3 46/22 47/10
47/12
however [2] 12/18 40/17
hung [1] 42/19
Hunt [1] 14/6

I

I'll [8] 4/10 9/1 17/15 18/7 23/17 29/24
32/8 42/16
I'm [31] 4/12 4/17 5/3 5/11 5/17 5/23
5/24 8/15 10/7 10/17 16/3 20/7 21/10
21/10 23/15 25/3 27/11 28/9 31/6
31/10 31/12 31/13 32/10 32/13 32/25
37/3 37/6 38/6 41/12 46/1 49/13
I's [1] 35/3
I've [8] 4/7 4/15 9/2 10/1 10/4 17/17
22/17 24/18
idea [6] 19/16 19/18 27/13 30/20 36/4
38/13
identify [1] 21/23
identifying [1] 10/19
imagination [1] 40/3
implies [1] 12/20
important [3] 15/5 16/4 30/25
imported [1] 17/20
impressed [1] 43/23
improved [1] 18/22
INC [4] 1/3 1/6 3/6 3/17
includes [2] 8/13 45/16

J

Jacob [4] 2/10 3/18 18/10 41/9
jam [1] 11/21
January [2] 47/7 47/10
January 2nd [2] 47/7 47/10
Jensen [2] 2/13 3/23
John [12] 2/2 3/10 3/12 18/10 23/18
24/24 25/18 32/6 32/8 33/3 41/9 48/11
joint [4] 4/2 5/1 14/4 36/9
Jonathan [1] 2/5
Jose [1] 2/9
judge [9] 1/16 5/15 19/11 19/17 38/8
38/13 38/14 38/14 39/5

judge's [3] 4/5 4/6 4/9
 judges [3] 19/17 38/24 39/5
 judgment [25] 9/8 9/15 9/23 19/6 19/15
 19/21 19/22 20/10 20/12 21/17 21/18
 21/24 22/20 22/20 23/3 23/4 23/8
 23/10 23/16 40/18 47/21 47/21 48/4
 48/7 48/15
 judicial [1] 38/18
 July [8] 6/21 7/7 7/8 7/12 8/19 8/23
 13/9 39/16
 July 11th [1] 13/9
 July 17th [2] 7/8 39/16
 July 2017 [1] 7/12
 junctures [1] 25/23
 June [6] 6/18 11/10 12/21 13/8 19/11
 39/11
 June 23rd [2] 11/10 12/21
 June 23rd to [1] 13/8
 juries [2] 42/1 46/5
 juror [2] 42/6 43/23
 jurors [9] 42/11 42/18 43/3 43/9 43/13
 43/18 43/22 43/24 43/25
 jurors to [1] 42/18
 jury [22] 7/7 7/14 8/13 8/13 19/24 22/10
 25/6 25/7 42/3 42/19 42/19 42/20 44/4
 44/5 44/18 45/6 46/17 47/1 47/2 47/12
 47/14 47/15
 just [28] 5/5 6/4 6/6 6/23 8/18 10/7
 10/15 12/11 12/11 12/14 12/16 12/20
 13/12 14/17 17/6 19/2 22/9 22/25 23/8
 29/24 32/2 37/22 40/19 40/23 42/4
 47/1 47/9 49/14
 justice [4] 6/1 19/8 19/8 20/7

K

keep [2] 6/25 45/6
 key [2] 20/14 31/12
 know [42] 4/23 5/5 5/8 5/20 6/4 6/15
 6/16 6/20 7/10 7/10 9/7 11/20 13/9
 17/5 17/16 18/10 20/1 20/3 22/3 23/12
 24/11 25/5 25/14 25/15 27/10 27/11
 27/11 29/17 31/8 34/20 38/1 38/3 38/4
 38/15 39/8 39/9 41/13 41/14 41/18
 43/25 48/2 49/13
 knowing [1] 49/15
 knows [1] 27/4

L

Labor [2] 28/1 34/10
 Labor Day [1] 28/1
 laches [1] 48/4
 lack [1] 29/7
 lacking [1] 33/22
 large [1] 15/20
 larger [1] 8/17
 last [6] 4/1 6/14 12/8 13/19 34/5 35/23
 later [13] 8/6 8/22 13/15 24/8 27/14
 27/25 28/3 28/13 29/8 35/6 35/19
 44/18 46/9
 latest [1] 24/11
 law [7] 2/6 3/10 12/10 15/12 19/10
 19/25 41/16
 lawsuit [1] 25/14
 lawyer [1] 42/13
 lawyering [2] 21/12 43/5
 lawyers [8] 21/11 42/10 42/12 42/21
 43/3 43/10 43/14 43/14
 lead [2] 16/24 16/25
 learned [1] 28/7

M

magistrate [2] 4/4 38/14
 mail [8] 14/5 14/9 14/14 14/17 15/2
 15/5 15/6 40/13
 mails [1] 14/25
 Main [1] 19/8
 make [23] 5/8 5/13 5/25 6/6 8/11 9/6
 11/6 11/22 12/21 17/7 18/22 19/1 23/8
 24/7 25/19 27/3 32/1 32/23 32/24 33/1
 35/3 45/13 49/14
 maker [1] 20/6
 makes [4] 12/22 27/13 34/9 46/4
 making [1] 16/3
 management [3] 3/7 4/1 24/15
 Mansfield [4] 2/5 2/6 3/10 3/10
 many [4] 4/16 11/4 17/1 32/11
 March [1] 40/18
 March 10th [1] 40/18
 marginally [3] 45/19 45/19 45/23
 Markman [4] 4/5 4/7 17/8 24/19
 Mary [7] 14/8 14/20 16/16 28/15 33/20
 40/19 40/22

match [1] 6/14
 material [2] 19/23 20/19
 materiality [1] 34/6
 materials [1] 4/2
 matter [2] 5/19 13/12
 matters [2] 4/23 27/21
 may [22] 6/5 6/8 6/16 7/21 9/16 13/10
 13/10 13/13 13/17 16/24 19/14 25/14
 28/6 28/6 31/25 34/7 39/9 39/9 39/11
 42/2 48/13 49/4
 May 8 [1] 9/16
 maybe [19] 6/16 9/12 16/21 17/6 17/7
 17/22 18/23 20/5 22/3 23/18 24/17
 28/20 28/25 31/7 32/9 38/21 43/20
 44/7 45/3
 me [70]
 mean [6] 15/13 16/7 19/20 20/24 27/18
 33/4
 meaningfully [1] 19/4
 means [8] 6/7 6/8 8/23 9/14 10/11
 17/14 44/18 46/6
 mediation [2] 38/20 39/4
 mediator [1] 38/23
 meet [2] 40/2 42/11
 meeting [4] 37/24 41/8 41/23 49/13
 Members [1] 47/1
 memorandum [2] 20/17 21/8
 mention [1] 25/21
 mentioned [1] 30/5
 met [2] 5/19 41/11
 MICHAEL [1] 1/15
 middle [1] 25/1
 might [7] 28/21 32/24 34/23 39/25 40/3
 43/11 48/16
 mind [6] 12/6 29/17 35/16 35/21 36/5
 49/10
 minor [1] 40/7
 minute [4] 40/23 44/11 44/11 45/1
 minutes [1] 44/10
 miscalculated [1] 7/20
 missed [1] 9/2
 missing [1] 11/2
 mistake [1] 16/3
 misunderstanding [1] 37/9
 misunderstood [1] 36/8
 mitigate [1] 29/23
 mitigation [1] 29/12
 model [5] 18/11 18/19 18/21 18/24 19/4
 moderate [1] 42/15
 modifications [2] 9/3 40/7
 modified [3] 4/13 30/1 49/4
 moment [1] 32/8
 money [1] 7/17
 months [2] 39/22 39/23
 more [17] 7/22 13/1 13/13 18/7 19/11
 21/19 22/17 22/21 25/1 33/2 33/9
 36/20 37/4 40/23 45/7 46/2 46/24
 morning [2] 3/4 44/11
 Morrison [1] 2/6
 most [16] 9/6 16/17 17/13 20/14 22/12
 23/10 23/11 24/11 25/23 29/25 37/20
 39/5 42/1 42/10 42/17 45/13
 mostly [3] 8/17 15/11 25/19
 motion [24] 4/8 10/25 11/13 13/25
 14/16 15/21 19/21 20/10 20/17 21/4
 22/6 22/20 24/7 32/11 47/23 48/3 48/6
 48/14 48/19 48/21 48/25 49/6 49/7
 49/8
 motions [12] 4/22 9/16 9/19 13/16

motions... [8] 13/24 14/2 16/7 16/13
 23/17 40/17 47/21 48/21
 motivating [1] 10/23
 movant [5] 20/19 21/25 22/5 22/17
 23/3
 movant's [3] 14/13 21/15 22/4
 move [1] 28/23
 moved [2] 19/9 22/21
 moving [2] 22/12 22/13
 MR [1] 3/14
 Mr. [3] 33/10 46/21 47/2
 Mr. Oliver [1] 33/10
 Mr. So [1] 47/2
 Mr. Witness [1] 46/21
 Ms. [2] 47/3 47/3
 Ms. So [1] 47/3
 Ms. So and [1] 47/3
 much [17] 4/20 7/8 8/2 8/12 9/10 9/19
 13/21 27/10 27/12 29/14 30/6 45/22
 46/7 46/24 47/16 49/12 49/17
 my [46] 4/10 5/22 6/21 6/25 7/7 7/12
 8/1 8/9 8/22 9/8 9/11 10/23 12/22
 12/24 12/25 13/22 14/2 14/3 14/6 14/7
 14/8 14/22 16/1 16/14 17/17 18/14
 18/17 18/18 19/3 19/7 23/9 23/10 24/4
 28/2 28/12 28/16 29/21 30/4 35/23
 37/20 38/8 38/9 40/9 41/16 42/21
 42/23

N

name [3] 10/13 23/22 34/18
 narrow [1] 16/5
 narrowing [1] 13/1
 nature [1] 27/24
 necessarily [2] 12/25 37/7
 necessary [2] 20/22 21/4
 need [46] 7/21 8/5 9/5 10/6 11/15 12/1
 12/15 12/19 15/11 15/13 16/18 16/23
 17/4 17/8 17/22 18/3 18/4 18/7 18/8
 19/22 23/1 23/13 25/3 25/9 25/11 26/1
 26/7 26/7 26/16 26/17 28/19 30/11
 31/21 32/22 33/13 34/7 35/2 37/3 37/9
 40/9 40/15 40/20 44/19 47/14 48/2
 48/9
 needed [2] 8/19 28/6
 needing [2] 17/20 48/20
 needs [3] 9/23 21/19 22/11
 never [6] 15/4 31/2 31/2 32/18 35/12
 45/14
 new [11] 6/3 12/21 13/17 17/14 27/7
 28/7 28/10 28/19 28/20 29/15 29/19
 next [1] 6/22
 nice [2] 24/24 41/23
 Nicholle [1] 23/20
 night [2] 4/1 6/14
 Ninth [5] 23/19 23/24 24/6 24/6 24/9
 Ninth Circuit [1] 24/9
 no [17] 7/3 11/23 13/16 16/7 16/13
 17/10 19/23 21/15 21/18 21/19 22/14
 27/4 34/25 36/19 36/24 39/14 44/18
 No. [1] 21/20
 No. 2 [1] 21/20
 non [4] 22/12 43/25 48/7 48/15
 non-infringement [2] 48/7 48/15
 non-moving [1] 22/12
 non-smarter [1] 43/25
 None [1] 41/6
 normally [4] 7/24 31/18 36/2 44/4
 North [2] 23/23 24/1

Northern [3] 4/14 45/2 50/3
 Northern District [1] 4/14
 not [87]
 note [2] 4/25 49/6
 nothing [3] 11/11 21/19 41/7
 noticed [2] 13/17 46/3
 notify [1] 36/5
 noting [1] 6/21
 notwithstanding [1] 5/23
 now [29] 3/8 5/6 5/21 6/2 6/22 7/12
 13/19 14/24 17/10 22/7 24/6 27/12
 28/4 28/9 29/19 30/3 31/6 35/12 35/17
 36/5 37/2 37/3 37/8 37/8 41/5 47/2
 47/18 47/20 48/19
 nuances [1] 15/12
 nullity [1] 11/19
 number [6] 4/1 5/14 8/24 38/24 45/12
 47/5
 numbered [2] 6/24 21/14
 numbers [3] 44/12 44/15 44/22

O

Oak [1] 2/11
 objection [2] 4/7 5/16
 objections [1] 24/19
 objective [1] 5/22
 obligation [3] 6/2 23/4 33/6
 obligations [1] 13/23
 obviously [17] 12/10 16/14 17/4 19/23
 20/1 21/2 22/8 22/11 24/5 24/6 24/8
 24/10 32/21 32/22 34/9 40/6 48/21
 occasionally [1] 15/15
 October [1] 7/5
 odd [1] 6/24
 odd-numbered [1] 6/24
 off [4] 13/6 38/19 42/16 43/2
 official [2] 15/3 50/10
 often [3] 13/1 20/2 45/7
 oftentimes [1] 8/13
 Oh [3] 18/21 35/16 41/19
 okay [8] 6/6 23/12 24/13 25/3 25/5
 25/13 35/10 39/15
 old [1] 41/16
 olden [1] 18/25
 older [1] 19/14
 Oliver [4] 2/8 3/20 10/14 33/10
 once [1] 39/17
 one [31] 5/16 9/22 10/23 15/21 17/18
 18/12 18/19 20/4 20/20 20/21 22/19
 24/21 24/24 25/1 27/12 28/16 30/7
 34/2 34/3 35/9 39/5 40/11 42/5 44/2
 44/5 44/7 44/16 45/18 47/6 48/6 48/7
 one-tier [1] 18/12
 oneself [1] 45/24
 ongoing [1] 5/4
 only [6] 7/15 14/13 21/3 45/15 45/22
 47/18
 oOo [1] 50/2
 open [1] 7/13
 opening [3] 44/6 45/14 49/1
 operate [1] 30/15
 operated [1] 30/16
 operating [1] 30/22
 opinion [8] 4/5 6/9 23/9 36/1 36/17
 36/23 37/1 38/10
 opinions [2] 6/12 34/1
 opportunities [1] 37/16
 opportunity [11] 11/13 15/14 15/15
 15/19 16/4 21/17 24/18 26/3 28/4 28/5
 37/7

opposed [2] 40/2 40/22
 opposed [1] 41/1
 opposes [1] 40/21
 opposing [1] 32/3
 opposition [1] 48/14
 oppositions [1] 9/19
 oral [1] 9/14
 order [19] 4/1 4/6 16/11 16/20 16/22
 16/25 17/7 17/9 17/11 17/15 18/5 18/8
 18/11 18/15 24/15 30/9 32/13 38/6
 40/23
 ordered [1] 33/6
 orders [3] 4/24 12/2 16/19
 OREGON [9] 1/2 1/7 2/7 2/12 13/14
 19/9 31/4 34/24 38/15
 original [2] 22/13 50/6
 other [50] 4/19 6/24 7/19 8/3 8/24
 13/12 14/5 16/15 17/7 17/9 17/16
 18/25 19/5 20/4 20/15 20/23 21/9 23/5
 27/4 27/20 27/21 27/23 28/3 28/10
 28/14 29/1 29/4 29/12 32/10 32/15
 32/21 33/1 33/6 33/18 34/17 34/25
 35/20 37/18 37/19 38/15 40/3 40/13
 40/21 40/22 42/4 43/1 45/20 46/14
 47/13 47/18
 other's [1] 21/11
 others [3] 47/23 47/24 48/22
 otherwise [2] 12/17 41/24
 our [25] 6/3 13/9 14/19 14/20 14/21
 15/9 17/2 17/11 18/18 18/22 18/24
 19/4 26/24 27/22 29/4 35/16 36/5
 38/24 39/4 39/22 42/3 42/6 43/23 44/5
 48/14
 ours [1] 26/23
 out [26] 12/13 14/8 17/3 17/21 18/4
 18/8 19/5 19/16 20/2 22/25 23/2 24/9
 27/8 28/16 29/3 29/5 29/12 29/22
 34/10 39/10 41/9 42/11 42/12 43/23
 44/1 46/9
 outside [1] 37/25
 over [6] 16/11 19/1 20/1 45/24 45/24
 45/24
 own [3] 3/8 38/23 42/7

P

PACER [1] 17/2
 packaged [1] 8/12
 pages [1] 30/12
 panel [2] 42/3 42/8
 papers [1] 48/22
 paragraph [1] 47/1
 parameter [1] 15/23
 paraphrasing [1] 10/17
 part [10] 10/22 14/25 17/5 19/15 20/2
 21/24 23/12 29/1 42/1 42/17
 partial [4] 19/21 22/20 23/3 47/21
 particular [5] 15/11 20/12 20/13 22/2
 38/21
 particularly [3] 8/25 38/13 38/17
 parties [16] 6/2 6/8 8/10 9/7 13/22
 18/14 26/21 27/2 30/14 31/17 42/12
 42/21 43/14 43/15 46/24 49/2
 party [8] 10/15 10/17 22/12 22/13 27/4
 27/6 33/5 42/10
 party's [1] 32/3
 pass [1] 43/16
 passed [5] 5/19 25/23 26/11 26/12
 29/16
 past [1] 34/2
 patent [22] 4/15 4/16 5/11 6/4 10/18

patent... [17] 11/4 11/17 12/22 24/20
26/10 27/19 34/3 35/14 38/3 38/12
38/12 38/18 38/21 39/1 39/5 43/20
43/20
patents [4] 5/10 5/14 17/18 48/7
Paula [2] 2/13 3/23
people [9] 12/9 15/15 19/1 26/15 29/9
30/1 37/24 42/5 46/4
people's [1] 45/7
per [1] 46/2
percent [2] 14/22 45/3
peremptory [1] 42/7
perfectly [1] 13/5
perhaps [2] 5/19 17/21
period [1] 9/25
Perkins [2] 19/10 41/17
permission [1] 16/14
perpetuated [1] 46/15
person [2] 36/21 36/24
personally [1] 6/23
perspective [3] 31/16 48/1 48/12
perspectives [1] 38/11
persuasive [2] 43/4 43/4
Ph.D.s [1] 42/3
phone [3] 16/16 16/17 41/2
phrased [1] 36/21
pieces [1] 13/3
pin [1] 29/9
pinpoint [1] 21/5
plaintiff [23] 1/4 2/2 3/9 3/11 3/13 3/15
6/8 6/15 6/17 6/19 7/10 11/12 11/12
11/21 25/17 25/19 26/22 30/15 30/22
41/6 48/5 49/3 49/5
plaintiff's [1] 48/11
plaintiffs [1] 8/21
PLANAR [12] 1/6 3/6 3/16 3/24 4/9
4/25 8/17 34/2 36/17 36/22 36/25 42/4
Planar's [4] 4/7 5/16 34/15 36/14
planning [2] 5/17 44/4
play [1] 37/18
pleading [1] 17/10
Please [2] 31/7 39/16
pleasure [3] 41/8 41/9 49/13
plenty [2] 7/16 28/18
PLLC [1] 2/3
Plus [1] 34/5
point [13] 9/16 11/19 12/3 15/11 18/22
19/5 26/16 34/8 35/10 44/9 48/10 49/8
49/11
polymer [1] 47/8
Pomona [2] 23/23 24/1
pool [2] 42/6 43/23
portions [1] 21/23
Portland [5] 1/7 2/7 2/12 2/24 42/1
position [9] 14/13 14/15 26/19 26/20
26/24 34/15 36/15 47/3 47/4
positions [3] 14/12 27/6 27/7
possibility [1] 18/21
possible [1] 6/16
postponing [1] 4/21
potential [1] 47/20
practical [1] 37/15
practically [1] 10/12
practice [7] 4/21 4/21 11/1 11/13 19/7
33/4 42/14
practiced [2] 19/7 19/10
practicing [2] 19/6 19/13
pragmatic [1] 37/15
precedent [4] 5/2 24/6 24/7 24/11

prefer [1] 28/3
prefer [1] 46/5
preferably [1] 6/21
preference [1] 6/21
prejudice [5] 29/13 29/24 29/25 35/20
37/19
prejudiced [3] 28/20 29/11 29/22
prejudicial [1] 28/11
preliminary [3] 4/23 26/22 27/1
premature [1] 48/18
prepare [2] 13/9 47/10
prepared [2] 5/11 8/11
presence [1] 42/22
present [9] 2/13 3/3 10/16 10/18 30/21
30/24 37/17 37/17 47/12
presentations [1] 43/6
presented [2] 10/1 47/5
preserve [1] 15/11
pressure [1] 8/3
presume [1] 48/14
presumption [1] 18/14
pretrial [13] 7/25 8/3 8/6 8/9 8/10 8/14
9/5 9/9 9/13 13/8 13/9 30/24 46/11
pretty [12] 4/13 7/8 8/11 13/21 18/17
38/25 39/13 40/4 41/3 42/2 42/8 43/7
previously [1] 5/9
primarily [1] 47/19
primarily for [1] 47/19
prior [7] 10/20 13/3 13/16 14/3 14/3
16/8 39/4
private [1] 38/23
privilege [6] 15/17 35/9 35/11 35/13
35/18 35/19
privileged [1] 35/18
probably [11] 9/14 11/3 14/10 20/16
26/22 27/23 39/24 44/5 44/20 46/19
48/18
problem [1] 29/6
procedure [2] 13/18 16/10
procedures [1] 30/8
proceedings [2] 1/14 50/5
process [2] 33/9 33/9
produce [10] 30/10 30/16 31/7 31/18
32/13 33/6 33/12 33/14 33/19 33/22
produce X [1] 33/14
produced [9] 30/12 31/25 32/17 32/22
33/5 33/14 33/16 33/17 33/18
producing [1] 32/12
production [6] 13/24 30/11 30/11 31/17
31/21 31/24
products [1] 39/9
progresses [1] 7/19
prohibition [1] 27/22
prohibits [1] 27/17
prompt [1] 37/22
promptly [2] 14/24 30/1
proof [1] 21/6
property [1] 13/2
proportionality [2] 15/22 33/22
propose [1] 18/24
proposed [5] 6/10 7/1 7/2 18/5 25/16
propositions [1] 20/1
propounding [1] 44/24
prospective [2] 42/3 42/6
protect [1] 32/15
protective [9] 16/11 16/19 16/19 16/22
17/9 17/11 17/15 18/11 18/15
provide [2] 20/4 20/5
provided [1] 10/5
provision [1] 30/9

purposes [5] 17/7 18/12 21/16 23/6
23/7
push [2] 37/24 39/22
put [13] 6/9 8/1 8/2 10/8 15/3 20/25
20/25 21/3 21/8 28/1 34/13 46/17
46/18
puts [1] 28/9
putting [1] 20/8

Q

quarters [1] 42/24
question [17] 10/7 10/23 11/20 22/10
23/1 30/2 35/23 36/3 36/11 36/16
36/18 36/20 36/22 36/24 36/25 37/8
47/18
questioning [1] 45/16
questions [10] 20/5 25/19 28/16 30/4
42/16 43/10 43/13 43/14 45/20 45/23
quickly [2] 15/9 22/24
quite [4] 6/3 25/21 41/19 46/1
quote [1] 10/17

R

rarely [3] 39/18 39/18 42/16
rather [6] 8/22 13/4 27/24 28/2 28/13
29/8
RDR [2] 2/23 50/10
re [2] 37/4 37/10
re-depose [1] 37/4
re-depose that [1] 37/10
reach [1] 6/3
read [8] 4/1 4/2 4/3 4/4 4/8 10/5 36/9
47/1
reading [1] 38/2
reads [2] 12/14 12/25
ready [3] 7/4 8/12 23/6
real [3] 15/12 16/6 44/13
realistic [1] 44/24
really [36] 4/19 4/20 5/3 5/4 6/14 6/24
7/21 8/19 8/20 9/3 10/11 12/3 13/23
13/25 14/1 15/11 15/13 16/3 16/4
17/22 18/7 19/1 19/17 20/9 21/3 21/6
22/14 22/25 24/21 27/25 29/9 32/16
36/9 39/19 40/4 42/25
reason [9] 18/1 22/13 39/14 39/19
39/20 39/24 39/25 40/2 40/25
reasonable [5] 4/17 9/18 9/20 17/13
37/16
reasonableness [1] 15/23
reasonably [5] 30/1 32/24 37/21 37/22
37/22
reasons [1] 40/3
received [5] 33/11 33/11 33/13 36/1
42/19
recent [1] 23/24
recently [2] 4/20 17/3
Recess [1] 49/19
recollection [1] 24/4
record [10] 14/25 16/2 16/2 17/5 21/5
21/24 26/23 32/1 43/2 50/5
recrosses [1] 45/17
redirects [1] 45/17
redo [2] 6/9 33/8
reduce [1] 15/21
redundant [1] 12/4
refiled [1] 17/22
regarding [2] 5/20 47/7
regular [3] 14/7 14/8 44/14
rejected [1] 5/17
rejecting [1] 4/7

related [1] 48/4
relating [1] 16/13
relative [3] 6/5 22/24 49/16
relatively [2] 7/13 37/2
relevance [1] 15/22
relevant [11] 17/1 30/10 30/21 31/8
31/18 31/20 32/2 32/3 33/12 45/19
45/23
relevant/marginally [1] 45/19
reliance [3] 35/7 36/12 36/13
relief [1] 29/14
rely [5] 34/3 35/11 35/12 36/7 36/25
relying [2] 32/2 34/16
remarkably [1] 46/4
remember [4] 11/18 16/24 19/14 41/21
remnant [2] 11/3 11/5
reopen [3] 28/22 28/24 30/14
reopened [1] 5/21
reopening [1] 13/15
reopens [1] 27/14
repeating [1] 45/23
replies [1] 9/19
reply [3] 22/14 22/17 22/18
report [7] 4/2 5/1 36/9 46/23 49/2 49/3
49/9
REPORTER [2] 2/23 50/10
reports [7] 6/10 12/18 26/3 26/16 26/21
47/4 49/1
representing [4] 3/9 3/11 3/13 3/15
request [9] 15/23 30/11 31/3 31/7
32/16 33/17 34/12 34/13 35/4
requested [4] 6/15 8/16 9/20 10/9
requests [7] 30/11 31/21 31/23 32/9
32/20 33/1 34/9
require [4] 19/24 20/18 33/8 48/22
requirements [1] 12/11
reserved [1] 6/25
reserving [1] 21/17
resolution [7] 5/7 6/4 6/7 15/25 19/24
37/21 49/14
resolve [4] 15/8 28/15 33/20 41/24
resolved [4] 14/1 14/23 16/16 16/17
resolves [1] 33/7
resolving [1] 20/22
respect [2] 18/23 31/21
respond [4] 4/11 28/3 34/12 34/14
respondent [6] 14/14 21/7 21/13 21/25
22/15 36/11
respondent's [1] 22/7
response [9] 21/7 27/8 28/10 28/25
29/21 30/19 31/2 33/19 33/20
responsive [2] 14/14 32/16
rest [1] 41/1
retain [1] 36/22
retired [1] 39/4
revise [1] 26/3
revisit [1] 39/11
revisited [1] 37/3
right [20] 3/4 3/8 3/25 5/22 5/25 6/7
7/12 17/10 19/25 25/24 27/12 28/9
30/3 31/12 32/6 41/8 45/13 47/9 47/20
48/19
righteousness [1] 20/7
RMR [2] 2/23 50/10
road [2] 2/3 47/17
Room [1] 2/24
rough [1] 45/2
round [1] 44/12
rule [9] 6/1 13/20 14/2 26/10 27/17

30/6 30/20 31/5/2
rules [9] 4/11 4/16 11/4 13/18 25/20
25/21 26/9 26/10 27/16
ruling [1] 16/1
rulings [6] 8/11 9/8 9/12 23/10 36/3
37/20
run [3] 8/9 27/22 45/20

S

safe [1] 16/9
said [9] 5/6 11/23 21/12 21/19 24/23
29/20 34/9 35/25 43/23
same [5] 5/10 5/14 6/18 26/9 49/8
San [1] 2/9
sandbag [1] 12/11
Santa [1] 2/9
sat [1] 23/19
satisfied [1] 13/6
say [24] 11/12 16/5 18/21 20/14 21/15
22/3 22/18 23/17 25/13 26/23 27/25
29/18 30/15 33/12 33/22 35/10 35/21
39/21 40/20 42/16 43/10 43/12 43/16
48/8
saying [7] 26/13 27/6 29/16 32/18
33/10 36/25 46/1
says [7] 7/10 21/13 22/15 27/20 28/11
30/10 33/5
schedule [15] 6/11 6/13 6/22 7/2 8/2
8/6 9/11 10/1 13/6 25/16 25/25 26/1
40/2 41/3 49/4
scheduled [1] 7/11
schedules [2] 7/1 9/21
scheduling [1] 12/2
Schlachter [1] 2/11
Schlather [4] 2/2 2/3 3/14 3/14
scope [1] 48/8
sealed [1] 17/10
search [1] 15/23
second [4] 5/17 5/24 8/5 12/7
second-guess [1] 5/24
second-guessing [1] 5/17
secrets [1] 15/17
section [3] 10/10 10/15 21/1
Section 282 [1] 10/10
see [19] 5/2 7/6 10/4 10/8 12/2 15/1
24/12 25/7 26/16 27/2 27/16 29/8
29/12 30/22 40/17 43/17 44/23 46/3
46/19
seeing [1] 41/9
seem [1] 33/15
seen [14] 6/10 6/13 15/15 18/25 22/17
24/20 31/2 31/20 41/15 41/22 48/23
49/1 49/5 49/9
sees [1] 39/10
selected [3] 7/6 7/9 44/5
send [4] 14/25 23/4 33/17 35/4
sense [6] 9/6 14/18 18/2 27/13 37/2
37/14
sent [3] 3/25 6/13 36/9
separate [1] 20/18
separately [1] 23/4
September [3] 6/21 7/5 8/20
seriously [2] 6/1 13/23
serve [6] 27/14 29/7 31/23 32/9 32/20
38/8
served [2] 31/3 31/21
set [11] 7/14 7/18 7/19 7/22 11/8 14/9
14/10 14/20 23/13 31/23 39/17
sets [2] 14/12 24/4
settle [2] 37/24 38/5

settlement [7] 9/8 9/28/18 38/20 38/24

38/25 39/2 39/11

seven [9] 7/7 7/9 7/14 7/21 7/23 44/4

44/20 45/6 45/8

seven-day [5] 7/7 7/14 44/4 45/6 45/8

share [2] 35/2 35/2

she [7] 14/7 14/10 14/10 17/3 47/4

47/4 47/6

shield [2] 35/15 35/15

Shlachter [1] 3/19

shortly [1] 27/25

should [23] 5/20 9/3 12/16 14/1 15/13

16/6 22/5 25/15 27/14 27/23 27/25

29/20 32/9 32/17 33/11 33/14 36/5

38/4 40/4 41/3 41/5 46/9 47/24

shouldn't [6] 5/21 28/12 29/17 29/18

38/5 46/10

show [5] 22/9 22/16 46/14 46/20 47/11

showing [1] 31/12

shows [1] 22/1

SI [1] 1/3

side [27] 6/14 9/17 14/5 19/2 20/4 20/4

20/6 20/23 21/9 23/5 28/3 28/11 29/12

30/19 33/1 33/1 33/6 35/9 35/20 37/18

37/19 40/21 40/22 43/22 44/24 45/11

46/2

side's [1] 45/20

sides [10] 27/13 28/4 30/10 30/21 32/9

37/16 38/9 38/22 46/16 47/19

sides' [1] 14/12

sign [1] 17/15

signature [3] 50/7 50/7 50/7

signed [1] 50/7

significant [7] 6/23 7/25 8/11 26/25

31/1 40/24 49/10

signing [1] 50/4

similar [1] 49/6

SIMON [1] 1/15

simple [2] 24/21 27/5

simply [2] 29/15 30/12

since [4] 13/13 13/21 27/10 28/17

sit [1] 34/11

situation [1] 22/22

six [6] 7/21 8/4 20/20 44/13 44/17

44/19

sleep [2] 46/18 46/18

small [1] 27/13

smart [1] 28/23

smarter [2] 43/24 43/25

so [84]

solution [2] 18/6 29/6

some [36] 4/19 4/23 5/18 5/20 6/8 9/3

9/19 13/4 15/2 15/8 15/12 18/1 22/5

23/12 23/24 24/18 24/21 25/10 26/3

26/24 29/12 32/10 33/18 34/4 34/8

34/17 35/9 36/5 36/12 37/15 39/8 42/3

43/21 44/19 46/11 48/21

somebody [11] 11/7 12/5 12/15 13/1

13/25 19/20 26/6 28/24 34/5 38/7

45/19

somehow [1] 40/13

someone [6] 10/11 12/9 28/9 29/10

38/9 38/20

something [25] 9/2 11/15 13/19 15/5

15/17 17/7 17/8 23/2 25/24 27/18

28/10 29/5 29/10 29/15 29/19 29/20

33/10 35/1 35/18 39/1 45/5 45/21 47/8

48/9 48/16

sometimes [3] 7/25 13/22 45/7

somewhere [2] 12/19 23/18

soon [3] 6/16 6/16 27/14
sooner [6] 8/22 9/12 27/24 28/2 28/13
29/8
sophisticated [2] 42/2 42/8
sort [2] 27/12 37/14
sorts [1] 20/24
sounds [2] 32/5 35/11
South [1] 2/3
SpaceCo [8] 4/4 6/17 7/10 16/25 17/16
39/9 39/11 49/7
speak [1] 16/21
speaking [2] 10/13 16/19
specialized [1] 38/16
specific [3] 15/21 21/14 21/23
specificity [1] 39/17
speedy [4] 6/3 6/5 49/15 49/16
spirit [1] 36/3
sponte [1] 30/13
spring [1] 30/25
SQM [2] 23/23 24/1
squabble [1] 19/1
stack [2] 13/25 15/20
stage [2] 23/13 23/17
start [4] 9/9 13/8 25/17 39/19
started [2] 7/24 19/7
starting [2] 3/8 7/7
state [3] 10/13 12/10 21/21
statement [5] 20/18 21/1 21/13 22/7
45/14
statements [3] 19/14 44/6 44/23
states [5] 1/1 1/16 2/23 10/10 10/15
status [4] 1/13 4/2 5/1 36/9
statute [2] 11/18 12/25
step [1] 27/13
Stephen [1] 2/2
Steve [3] 3/14 41/15 41/18
still [1] 26/16
stipulate [1] 23/7
stipulated [6] 17/15 18/8 18/15 23/6
23/11 46/25
stipulations [1] 23/5
Stoll [4] 2/11 2/11 3/18 3/18
stone [1] 11/9
stop [1] 20/8
strange [1] 12/14
Street [2] 2/9 2/11
strict [1] 46/1
strike [2] 18/6 24/20
strikes [2] 25/1 27/12
struck [1] 10/22
structure [1] 37/20
structured [1] 9/11
stuck [1] 35/19
stuff [2] 20/8 46/22
sua [1] 30/13
subject [1] 16/10
submit [5] 17/14 17/15 21/6 22/1 27/23
submitted [2] 7/2 21/25
subset [1] 13/4
substantive [1] 8/11
such [5] 15/22 29/16 29/16 47/8 47/8
sudden [1] 30/25
suffice [1] 11/23
suggested [2] 8/16 25/16
suggesting [1] 32/6
Suite [3] 2/6 2/9 2/11
summary [25] 9/8 9/15 9/23 19/6 19/15
19/21 19/21 20/9 20/12 21/16 21/18
21/24 22/20 22/20 23/3 23/4 23/7

42/2 42/4 46/2 48/4 48/8
their [24] 3/8 5/1 6/9 9/18 13/23 14/15
19/2 21/8 21/8 22/14 26/3 26/23 29/17
30/7 35/24 37/17 37/17 38/1 43/4 43/6
43/18 44/20 44/21 49/9
them [19] 19/17 19/18 19/18 19/19
26/4 29/3 30/25 32/13 32/20 32/25
35/2 35/3 35/4 37/7 42/6 42/7 43/13
46/18 48/13
then [49] 7/8 7/20 7/22 8/8 8/15 9/5
9/16 9/22 9/25 10/24 12/11 13/3 13/11
13/25 14/20 18/18 18/23 19/3 19/9
19/10 21/7 21/23 22/6 22/11 24/24
25/15 25/25 27/7 29/24 30/23 30/25
33/7 33/13 34/6 34/11 35/5 35/6 35/9
35/18 37/1 37/21 38/22 43/1 45/2
45/10 47/8 47/11 47/18 48/5
there [53]
therefore [3] 29/16 32/13 40/1
these [15] 4/16 9/21 14/21 14/24 15/10
19/14 19/25 22/8 23/12 31/25 37/15
38/1 39/19 40/4 40/7
they [77]
they've [2] 5/9 33/2
thick [1] 13/25
thing [3] 19/5 30/7 46/14
things [21] 6/9 7/19 8/3 8/8 8/16 10/19
15/2 15/22 17/9 19/23 20/24 21/3 26/5
26/21 32/11 32/24 37/15 40/9 43/7
43/21 44/2
think [69]
thinking [3] 4/10 10/2 47/24
thinks [1] 26/6
Third [1] 2/24
this [96]
those [29] 5/4 7/4 7/5 11/14 15/3 17/4
17/9 18/16 19/13 20/9 21/3 22/10
22/11 22/14 25/23 26/13 26/14 26/17
27/8 31/22 31/25 37/12 42/17 42/20
44/15 44/22 47/15 48/9 49/3
though [1] 16/3
thought [8] 8/20 9/6 10/4 18/1 29/19
43/4 43/5 46/11
threaten [1] 13/24
three [8] 8/6 20/20 39/21 39/23 42/5
42/24 44/8 44/17
three-quarters [1] 42/24
through [5] 12/17 14/21 15/10 29/4
43/19
thumb [1] 45/3
ticking [1] 45/22
tier [4] 18/12 18/12 18/19 18/19
tightly [1] 46/17
time [22] 5/15 7/16 7/19 8/17 9/10 9/18
11/4 11/5 11/19 13/3 14/16 20/21
20/21 27/13 28/18 37/25 42/10 44/20
45/2 45/13 45/22 46/6
time/one [1] 20/21
times [2] 45/15 46/12
Title [1] 10/10
today [1] 14/6
together [5] 6/2 8/1 14/4 46/16 46/25
too [4] 8/2 23/8 46/14 48/25
took [2] 13/21 40/1
top [1] 24/23
totally [1] 7/11
Tower [1] 2/3
town [1] 41/9
trade [1] 15/17
transcript [3] 1/14 50/5 50/6

transfer [2] 4/8 4/22
 transferred [3] 5/6 5/22 17/2
 treat [1] 41/3
 treating [1] 37/6
 trial [42] 6/15 6/17 6/18 6/20 7/4 7/7
 7/13 7/14 7/19 7/21 8/1 8/4 8/7 8/19
 8/20 8/22 10/16 10/18 11/6 11/9 13/3
 15/2 21/17 22/1 25/6 31/13 35/16
 39/10 39/13 39/16 39/23 41/25 42/9
 42/13 42/18 44/4 44/9 44/14 44/14
 45/6 45/8 47/16
 trials [1] 6/22
 tried [3] 5/8 5/13 11/21
 Trish [1] 14/6
 truly [1] 35/18
 try [10] 5/22 6/23 10/3 12/9 15/8 16/15
 20/5 22/16 37/15 45/8
 trying [3] 6/24 44/1 46/7
 turned [1] 19/16
 turns [2] 18/4 39/10
 Turocy [1] 2/8
 tutorial [2] 25/4 25/6
 tweaks [2] 9/3 25/16
 two [15] 7/25 15/21 18/12 18/19 19/23
 24/25 40/19 40/20 40/22 42/5 44/7
 44/16 44/17 45/1 46/18
 two-hour [2] 45/1 46/18
 two-tier [1] 18/12
 type [10] 25/3 25/10 31/11 32/10 32/14
 32/19 34/4 35/6 36/12 38/6
 types [4] 9/21 14/24 27/21 38/25
 typically [4] 18/12 34/3 34/6 35/8

U

U.S [1] 19/8
 U.S.C [1] 11/11
 unanimous [1] 24/4
 uncommon [1] 9/21
 uncontested [1] 48/17
 under [7] 6/3 7/5 30/16 30/16 30/22
 33/5 49/4
 understand [10] 4/18 5/18 25/14 25/22
 34/15 35/8 36/2 36/11 39/16 47/9
 understanding [3] 26/2 31/24 36/14
 understands [2] 25/20 38/21
 understood [1] 36/22
 undisputed [12] 19/14 19/25 20/15
 20/19 20/21 21/2 21/4 21/6 21/15 22/4
 22/9 22/15
 unfair [3] 28/12 31/11 37/19
 unfairly [2] 28/20 29/11
 unheard [1] 39/18
 unique [2] 13/13 30/7
 UNITED [4] 1/1 1/16 2/23 10/10
 United States [1] 10/10
 unless [9] 15/1 18/16 19/4 28/1 33/21
 35/21 39/18 39/24 42/9
 unrealistic [1] 9/1
 unreasonable [3] 18/16 29/23 37/18
 unreasonableness [1] 18/17
 unreasonably [3] 29/10 29/11 29/22
 until [7] 4/20 4/22 28/17 30/23 31/12
 40/12 46/20
 up [15] 9/25 14/20 23/9 23/14 32/15
 36/19 37/8 44/15 44/22 45/2 45/4 46/7
 46/16 46/25 48/16
 upon [3] 34/17 36/25 48/23
 us [6] 8/18 18/2 36/5 37/12 42/12 45/6
 use [7] 7/23 10/20 18/12 42/7 45/10

46/16 46/20 23/9 23/14 32/15
 36/19 37/8 44/15 44/22 45/2 45/4 46/7
 46/16 46/25 48/16
 upon [3] 34/17 36/25 48/23
 us [6] 8/18 18/2 36/5 37/12 42/12 45/6
 use [7] 7/23 10/20 18/12 42/7 45/10

used [7] 4/12 4/17 12/3 19/3 30/12
 45/3 46/19
 usually [5] 15/16 15/23 42/24 43/7
 44/10

V

vacation [2] 6/23 6/25
 various [3] 7/3 8/15 8/18
 verdict [1] 42/18
 versus [1] 3/6
 very [14] 6/1 22/23 30/25 36/16 37/15
 38/1 38/3 42/2 43/12 43/17 46/4 46/8
 49/12 49/17
 via [1] 14/17
 video [6] 46/17 46/18 46/20 47/9 47/11
 47/15
 videos [1] 46/14
 view [4] 12/10 24/5 24/12 32/3
 violates [1] 5/1
 Voss [1] 2/3

W

wait [3] 12/8 30/23 44/2
 waiting [1] 39/25
 waive [2] 35/10 35/19
 waived [1] 10/21
 want [53]
 wanted [4] 8/22 11/6 24/16 42/25
 wants [5] 17/5 19/2 19/20 22/14 26/2
 Ward [1] 39/5
 was [39] 4/8 8/16 8/22 11/5 11/7 16/11
 16/25 23/20 23/22 23/25 24/4 24/22
 24/24 25/1 26/1 26/23 26/23 33/25
 34/1 34/2 34/17 35/23 35/24 36/16
 36/18 36/18 36/20 36/21 36/23 36/25
 39/4 39/5 41/8 41/9 41/20 42/13 43/4
 48/4 49/6
 wasn't [1] 5/4
 wasted [2] 7/17 46/6
 Watson [1] 2/8
 wave [1] 9/13
 way [46] 4/25 7/3 7/9 7/9 7/18 8/9
 10/24 14/6 14/21 15/10 16/18 17/13
 17/23 17/23 18/2 18/10 18/23 19/2
 19/3 20/23 21/10 22/15 22/23 23/2
 23/9 24/12 27/2 27/3 27/16 29/4 29/23
 31/6 31/10 31/14 33/4 35/9 35/17 38/1
 38/22 39/13 39/21 43/9 43/19 43/24
 44/19 46/24
 we [142]
 we're [8] 18/6 18/13 32/2 38/25 44/3
 45/5 45/9 47/2
 we've [2] 13/5 31/25
 weapon [1] 33/1
 week [5] 7/25 13/15 14/7 14/8 27/14
 weeks [3] 8/1 30/5 30/24
 weigh [1] 34/7
 weird [1] 12/23
 welcome [5] 10/2 15/4 16/5 22/16
 47/24
 well [17] 7/6 12/3 13/8 13/11 20/3
 28/17 28/21 28/23 28/25 29/15 29/24
 30/19 31/2 32/18 37/23 42/2 47/19
 were [8] 7/18 19/15 24/21 26/21 26/25
 30/5 33/12 39/25
 West [1] 2/9
 what [66]
 what's [6] 17/16 18/18 26/19 31/6
 34/17 34/20

whatever [2] 26/20 22/13 27/23

28/5 28/19 39/20
 when [17] 8/1 11/5 11/10 12/16 13/3
 17/3 19/17 19/17 23/9 28/4 33/23
 41/18 42/13 42/20 44/22 45/7 45/15
 where [14] 4/10 8/18 11/21 20/19 21/5
 21/8 22/1 24/21 24/22 24/25 25/22
 32/1 32/11 35/15
 wherever [1] 20/16
 whether [12] 9/2 18/13 20/2 35/6 36/17
 38/4 38/13 40/21 42/6 46/9 48/8 48/20
 which [6] 6/7 17/23 26/10 26/11 35/20
 43/24
 while [5] 19/6 19/13 21/17 24/15 41/19
 who [12] 8/21 10/17 19/13 20/6 20/7
 36/21 38/20 39/5 42/11 45/4 46/22
 47/6
 whoever [2] 18/20 28/23
 whom [1] 46/21
 why [6] 21/22 21/22 22/5 22/16 22/21
 33/19
 will [117]
 willfulness [1] 34/6
 willing [2] 23/7 30/15
 win [1] 21/4
 window [1] 45/9
 winning [1] 22/19
 withhold [1] 13/24
 within [4] 18/1 34/23 35/22 45/5
 without [6] 13/16 14/2 16/7 16/14 30/10
 50/6
 witness [9] 44/13 44/23 44/24 44/25
 45/1 45/1 45/2 46/18 46/21
 witnesses [4] 44/8 45/4 45/16 46/13
 won't [2] 45/24 47/23
 wonderful [2] 21/9 30/20
 words [1] 19/1
 work [12] 7/8 7/16 8/18 9/17 25/22
 29/12 35/17 43/18 45/11 46/16 46/25
 47/12
 worked [3] 8/2 9/25 41/16
 working [4] 6/2 7/24 8/15 41/23
 works [4] 7/6 33/4 35/9 45/11
 worms [1] 30/15
 worries [1] 30/18
 worry [5] 23/14 26/14 44/3 45/19 46/6
 worst [1] 12/4
 would [27] 8/19 9/6 10/23 11/8 11/20
 12/3 12/13 12/19 16/10 22/6 25/7
 25/22 25/22 26/22 27/5 32/11 32/16
 33/9 33/13 34/10 34/11 34/22 36/4
 38/11 38/17 39/19 39/21
 wouldn't [1] 8/20
 Wow [1] 45/10
 write [1] 23/9
 written [2] 23/10 31/21
 wrong [2] 18/18 39/3
 wrote [1] 23/19

X

X's [1] 40/14

Y

year [2] 24/25 28/18
 years [9] 6/24 11/18 13/21 19/8 19/10
 19/11 41/16 41/22 47/5
 Yes [2] 16/13 32/7
 yet [1] 49/10
 you [260]
 you'll [2] 16/2 27/16

you're [1] 22/15
you've [3] 6/13 7/20 28/18
your [51]
Your Honor [2] 17/5 49/11
yourselves [2] 35/1 40/7